143-371

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~1225.~~ 844 ~~820~~ 1411

THE WINONA AND ST. PETER RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

THE TOWN OF PLAINVIEW.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

FILED OCTOBER 8, 1888.

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1 STATE OF MINNESOTA, *ss:*

In obedience to the command of the accompanying writ of error, issued in the action between The Town of Plainview, plaintiff, and The Winona and St. Peter Railroad Company, defendant, I, clerk of the supreme court of the State of Minnesota, herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case between The Town of Plainview, plaintiff, and The Winona and St. Peter Railroad Company, defendant, with all things concerning the same.

In witness whereof I have hereto subscribed my name and affixed the seal of said supreme court of the State of Minnesota, at the office of the clerk of said court, in the city of St. Paul, Minnesota, this 2nd day of October, A. D. 1888.

[Seal of the Supreme Court, State of Minnesota.]

J. D. JONES,
Clerk Sup. Court, Minn.

Be it remembered that on the 7th day of November, 1887, there was filed in the office of the clerk of the supreme court of the State of Minnesota a return to said supreme court from the district court of Minnesota in and for the county of Wabasha in words & figures following, to wit:

2 STATE OF MINNESOTA, } *ss:*
County of Wabasha, }

District Court, Third Judicial District.

THE TOWN OF PLAINVIEW, Plaintiff,
against
THE WINONA AND ST. PETER RAILROAD COMPANY, Defendant.

The State of Minnesota to the above-named defendant:

You are hereby summoned and required to answer the complaint of the plaintiff in the above-entitled action, of which a copy is hereto annexed and herewith served upon you, and to serve a copy of your answer to the said complaint on the subscribers, at the office of Kellogg & Eaton, in the city of Rochester, in Olmsted county, Minnesota, within twenty days after the service of this summons upon you, exclusive of the day of such service, and if you fail to answer the said complaint within the time aforesaid the plaintiff in this action will have the amount it is entitled to recover ascertained by the court or under its direction and take judgment for the amount so ascertained, together with the costs and disbursements of this action.

Dated Sept. 16th, 1884.

KELLOGG & EATON AND
C. K. DAVIS,
Plaintiff's Attorneys, Rochester, Minn.

Filed June 26, 1885.

CHARLES J. STAUFF, *Clerk.*

3 *Complaint.*

STATE OF MINNESOTA, *County of Wabasha:*

District Court, Third Judicial District.

THE TOWN OF PLAINVIEW, Plaintiff,
against
THE WINONA AND ST. PETER RAILROAD CO., Defendant.

The complaint of the plaintiff respectfully alleges and shows to this court—

That the plaintiff is and for ten years last past has been a town and municipal corporation duly created and organized under and by virtue of the laws of the State of Minnesota; that during the years A. D. eighteen hundred and seventy-eight and eighteen hundred and seventy-nine T. G. Bolton was the duly elected and qualified chairman of the board of supervisors of the said town, and C. E. Daniels and S. Struble were duly elected and qualified supervisors thereof, and A. B. W. Norton the duly elected and qualified town clerk thereof.

4 That the Plainview Railroad Company is and during all the times hereinafter stated was a corporation duly created and organized under and by virtue of the laws of the State of Minnesota, with power to build the railroad hereinafter mentioned, and that The Winona & St. Peter Railroad Company was during all the times hereinafter stated and now is a corporation duly created and organized under and by virtue of the laws of the State of Minnesota.

That on January 31st, 1878, the said Plainview Railroad Company made and delivered to the town clerk of the town of Plainview a proposition in writing, signed by the president and secretary of said company, containing all the statements and specifications required by section four (4) of chapter one hundred and six (106) of the General Laws of eighteen hundred and seventy-seven and stating the amount of bonds of said town desired to be fifty thousand ($50 000) dollars, and said town clerk immediately endorsed on said proposition the date of filing, and the same was transcribed in his records on March 30th, 1878, a copy of which proposition is hereto attached, marked Exhibit "A," and made a part of this complaint.

That thereafter and on the thirty-first day of January, A. D. 1878, the said Plainview Railroad Company posted up in three public places in said town notice that after a certain day, to wit, after February 6th, 1878, a petition to the supervisors of said town, appended to a copy of said proposition, would be presented to the resident tax-payers of the said town of Plainview, asking the said supervisors to agree to the said proposition filed with the said town clerk as aforesaid, a true copy of which notice is hereto attached, marked Exhibit "B," and to which notice was appended a copy of Exhibit

5 "A," which said notice, with said proposition, Exhibit "A," thereto attached, was published in a newspaper printed and

published in said town as provided by said act, which said notice was the only notice ever given in relation to said matter.

That thereafter and within three months after the filing of said proposition with said town clerk, to wit, on the 30th day of March, A. D. 1878, said railroad company delivered to said town clerk certain petitions, four in number, in the form required by section seven of said chapter one hundred and six of the General Laws of 1877; which said several petitions were in the following form, except the names appended thereto, which are herein omitted:

Petition.

"To the town board of supervisors of the town of Plainview, in the county of Wabasha and State of Minnesota:

"We whose names are hereto subscribed, being residents of said town, and who are assessed for taxes upon real or personal estate in said town, as shown by the last assessment-roll of said town, respectfully ask you, as the proper authorities of said town, to agree to the proposition of the Plainview Railroad Company to which this petition is appended.

"Dated 7th day of February, 1878."

To each of which said petitions was attached a copy of the proposition made by the Plainview Railroad Company, being Exhibit "A," hereto attached.

That said petitions, when so filed with said town clerk, bore the signatures of a majority of the persons residing in said town of Plainview who were assessed for taxes upon real or personal estate in said town, as shown by the then last assessment-roll thereof, which signatures were verified by the affidavits of persons witnessing such signatures; but the plaintiff alleges that said petition or petitions when so filed were not signed by and did not bear the signatures of a majority of the electors or legal voters of said town.

That many of the said resident tax-payers of said town whose signatures were so appended to said petition were not electors or legal voters in said town or at all, some of them being women, others being minor persons, others being copartnership firms paying taxes as such firms, and still others were aliens, who had not declared their intention to become citizens of the United States and were subjects of a foreign country; and the plaintiff alleges that, excluding said minors, women, copartnership firms, and aliens, said petitions did not bear the signatures of a majority of the resident tax-payers of said town, but that said petitions and the signatures thereto were made and obtained with, under, and pursuant to the provisions of section seven of the aforesaid act, and not otherwise; that said petitions, so signed as aforesaid and having appended thereto copies of said propositions, were filed in the office of the town clerk of the said town of Plainview on the 30th day of March, A. D. 1878; that the aforesaid petitions were the only petitions presented to said town clerk and the only ones ever made touching such matter or

asking the authorities of said town to agree to the proposition of the said railroad company, and that said petitions and said section seven of said act constituted the only authority had or claimed for the issue of the bonds hereinafter set forth.

That no election was ever held in said town to authorize the supervisors to agree to said proposition or the issue of any bonds of said town or in relation to said matter in any manner whatever.

7 That hereafter and on March 30th, 1878, the said board of supervisors of said town of Plainview, pretending and claiming to act and acting under and by virtue of the foregoing petitions, propositions, and proceedings, but in truth and fact without any authority or right whatever, did adopt and place on file in the office of the town clerk of said town of Plainview a resolution, a copy of which is hereto attached, marked Exhibit "C," and made part of this complaint.

That said supervisors had no authority to pass said resolution or to bind the town of Plainview thereby or to waive the issue of stock to said town, as therein adopted, and that said resolution was null and void; that no proceedings except as hereinbefore set forth had ever been taken by the electors of said town, or any proceedings or acts whatever to authorize the passing of said resolution.

8 That, pretending to rely upon the various acts and proceedings herein set forth, the said railroad company constructed its railroad, had the cars running thereon, and performed the several acts on its part as in said proposition stated, except that said railroad company never issued to the town of Plainview any stock of the said company or tendered or ever offered to issue the same.

9 That after the foregoing proceedings and after the said railroad was built and on the 18th day of March, A. D. 1879, the said board of supervisors of the said town, at the instance and request of said railroad company, wrongfully and unlawfully passed a resolution and placed the same on file in the office of the town clerk of said town, a copy of which said resolution is hereto attached, marked Exhibit "D," and made a part hereof.

That no authority had ever been given by the electors of said town or by said town or by any proceedings or acts to authorize said supervisors to pass said resolution, except the foregoing proceedings and acts, and the said supervisors and the said railroad company well knew when the same was passed and when the other resolution was passed, to wit, Exhibit "C," that a majority of the electors or legal voters of said town had not signed said petition or petitions, and that no election had been had authorizing the passing of said resolutions, and that said supervisors had no authority to pass the same or to bind the town thereby or to issue the bonds, as therein stated.

That thereafter and on March 19th, 1879, the said T. G. Bolton, chairman of the board of supervisors of said town, and A. B. W. Norton, town clerk of said town, pretending to act under and by virtue of the foregoing proceedings, acts, and resolutions and said section seven of said law, but in truth and in fact, as they well knew, without any authority whatever, wrongfully and unlawfully issued

and delivered to the Plainview Railroad Company certain negotiable bonds and interest coupons thereto attached, hereinafter more
10 particularly described; which said bonds were one hundred in number, pretending to be the bonds of the said town of Plainview, which said bonds were numbered from one to one hundred, consecutively.

That each of said bonds purports on its face to be the bond of the town of Plainview, and all payable to the Plainview Railroad Company or to the bearer, and are for five hundred ($500) dollars each, amounting to the sum of fifty thousand ($50,000) dollars, a copy of one of which bonds, all of which are alike, is hereto attached and marked Exhibit "E" and made a part hereof.

That said bonds were dated January 1st, 1879, payable in twenty years from the date thereof, bearing interest at seven per cent. per annum, payable annually according to the conditions of twenty certain interest coupons attached to each of said bonds and numbered corresponding to the number of said bonds, one payable January 1st, 1880, and one on January 1st of each year thereafter for twenty years, a copy of one of which coupons is hereto attached, marked Exhibit "F," and made part hereof; all of which, except the date of payment and the number of the bond, are alike, signed by said Bolton and Norton, as such officers, and delivered with said bonds.

That said officers had not been authorized by said town or by any vote of the electors or legal voters thereof or by any law of the State of Minnesota to issue said bonds and coupons or by any acts or proceedings whatever, except the pretended acts and proceedings herein set forth, all of which they well knew at said time, and that said bonds and coupons were executed and delivered by said town to said railroad company without any consideration whatever.

11 That said railroad company wrongfully and unlawfully received said bonds and coupons, well knowing that it had no authority to receive the same, and well knowing all the foregoing facts and proceedings herein set forth, and well knowing that said officers had not been authorized by said town or the electors or legal voters thereof to issue said bonds and coupons.

That said railroad company, well knowing the invalidity of said bonds and coupons and having knowledge of all the foregoing facts, acts, and proceedings herein set forth, on or about July 9th, 1879, wrongfully and unlawfully, intending to injure and defraud said town and deprive it of any defense to said bonds or coupons as against any *bona fide* holder for value thereof, sold, transferred, and delivered said bonds and coupons to citizens of the State of Wisconsin residing beyond the jurisdiction of this court; that said bonds and coupons were negotiable, and said parties purchased the same of said railroad company *bona fide*, in good faith, without notice of any of the foregoing facts invalidating the said bonds, and paid the railroad company therefor the full face value thereof, to wit, fifty thousand dollars, and the said bonds and coupons are now held and owned by citizens of the State of Wisconsin.

That by, through, and under such transfer and disposition said bonds and coupons were purchased and acquired by Samuel Mar-

shall and Charles F. Ilsley, residents and citizens of the State of Wisconsin, who purchased said bonds and coupons in good faith, for value, without notice of any of the facts invalidating them.

That thereafter and on or about the 29th day of January,
12 1881, the said Samuel Marshall and Charles F. Ilsley, who were then citizens of the State of Wisconsin, commenced an action at law in the United States circuit court for the district of Minnesota against the Town of Plainview, and that said court then and there obtained and had jurisdiction of the said action and of the parties thereto.

That said suit was brought to recover the amount of interest due upon forty-seven (47) coupons of said bonds falling due January 1st, 1881, and was brought upon said forty-seven coupons, the plaintiffs alleging that they were the owners and holders of said bonds and coupons, for value, before maturity, without notice of any of the facts invalidating them.

That said Town of Plainview defended said action upon the grounds herein set forth in this complaint, setting up all the facts, and such proceedings were thereafter had in said court that said court rendered judgment upon the said issues in favor of said plaintiffs against the Town of Plainview, adjudging, among other things, that the said bonds and coupons had been transferred to said plaintiffs before maturity and that they purchased them for a valuable consideration, in good faith, without notice of any facts invalidating the said bonds, except as appeared upon the face thereof, and that said town would be compelled to pay them, and that as between said innocent purchasers and said town they were a valid obligation against said town, and rendered judgment against said town accordingly for said coupons and for such interest in the sum of seventeen hundred and forty-six $\frac{98}{100}$ dollars ($1,746.98) damages and costs, which judgment the said town, this plaintiff, was compelled to and has satisfied and paid.

13 That thereafter the said Marshall & Ilsley duly brought in the last-mentioned court, which then and there had and obtained jurisdiction of said case and over the parties thereto, five other suits against said town of Plainview to recover upon certain other coupons of said bonds held and owned by them and the interest falling due, which said coupons had become due from year to year according to the terms thereof, to wit: One suit which was commenced on November 1st, 1881; another suit which was commenced on March 2d, 1882; another suit which was commenced on May 11th, 1883; another suit which was commenced on September 17th, 1883, and another suit which was commenced January 5th, 1884.

That to the suits brought November 1st, 1881, and March 2d, 1882, The Town of Plainview, this plaintiff, interposed substantially the same answers as to the first suit brought against it, but that to the other suits it made no answer for the reason that it was advised and believed that the question of its liability had become *res adjudicata* in said court.

That said court so proceeded in each of said actions that judgment

was rendered in each of said cases in favor of the plaintiffs and against the defendant as follows: In the action commenced November 1st, 1881, for seventeen hundred and seventeen $\frac{31}{100}$ dollars ($1,717.31); in the action commenced March 2nd, 1882, for forty-one hundred and fifty-four $\frac{8}{100}$ ($4,154.08) dollars; in the action commenced May 11, 1883, for twenty-five hundred and ninety-five $\frac{57}{100}$ ($2,595.57) dollars; in the action commenced September 17th, 1883, for seven hundred and seventy-one $\frac{15}{100}$ ($771.15) dollars; in the action commenced January 5th, 1884, for thirty-nine hundred and six $\frac{22}{100}$ ($3,906.22); all of which judgements this plain-
14 tiff has been compelled to and has heretofore duly paid and satisfied, except the last three, which it will be compelled to pay; and the plaintiff avers that all of said bonds and coupons having been, as in fact they have been, sold and transferred by said Plainview Railroad Company before maturity and for value to citizens of other States have become, are, and will be in the hands of such transferees or their assigns valid and subsisting obligations against this plaintiff, which this plaintiff will be compelled to pay in full, principal and interest, and was compelled to and did pay to such holders the first year's interest due on said bonds, to wit, the sum of thirty-five hundred dollars, being the coupons due January 1st, 1880.

That under and by virtue of an act of the Legislature of the State of Minnesota entitled "An act to authorize the Winona & St. Peter Railroad Company to purchase the stock and to purchase or lease the property and franchises of the Plainview Railroad Company," approved March 3rd, 1881, the passage of which act was procured by the Winona & St. Peter Railroad Company and which act after its passage was duly accepted and assented to by the Winona & St. Peter Railroad Company, was authorized to purchase the stock or to purchase or lease the property and franchise of the Plainview Railroad Company, and the said Plainview Railroad Company was thereby authorized to sell and convey or to lease its property and franchise to the said Winona & St. Peter Railroad Company upon such terms as the boards of directors of said companies might agree upon, so as to make the property and franchises of the Plainview Railroad Company the property and franchises of the Winona & St. Peter
15 Railroad Company, to be used and operated by it under its charter, and it was further provided in and by such act that any such purchase of the property or franchises of the Plainview Railroad Company should be made and all such property held by said Winona & St. Peter Railroad Company subject to all demands, claims, and rights of action against said Plainview Railroad Company arising or growing out of the latter company's having heretofore obtained and disposed of certain bonds and coupons purporting to have been issued by the towns of Plainview, Elgin, and Viola to said Plainview Railroad Company, and in taking such transfer under such act said Winona & St. Peter Railroad Company should assume all claims and demands against said Plainview Railroad Company to the extent and value only of the property and franchises so transferred, which act is hereby referred to for greater certainty.

That the bonds and coupons mentioned in said act are the same bonds and coupons mentioned in this complaint, and the Winona & St. Peter Railroad Company did under said act issue and dispose of its capital stock to an amount necessary to make and complete the purchase authorized by said act.

That on or about the month of May, A. D. 1881, the said Winona & St. Peter Railroad Company, acting solely under the provisions of said statute, purchased all the property and franchises of the Plainview Railroad Company referred to in said statute, which property and franchises were of the value of two hundred thousand dollars, which said purchase was made under and by virtue of said act and the powers therein granted, and the Winona & St. Peter Railroad Com-
16 pany in making said purchase and as part of the consideration therefor assumed all claims, demands, and rights of action against said Plainview Railroad Company, as in said act provided, including the claim, demand, and right of action herein set forth, and agreed to pay the same.

Wherefore the plaintiff demands judgment against said defendant for the sum of fifty thousand dollars, with interest thereon from January 1st, 1879, at seven per cent. per annum, together with the costs and disbursements of this action.

KELLOGG & EATON AND
C. K. DAVIS,
Plaintiff's Attorneys.

EXHIBIT "A."

Proposition.

To the Town of Plainview, in the county of Wabasha and State of Minnesota, and to the town clerk of said town:

The Plainview Railroad Company, a corporation existing and organized under the laws of the State of Minnesota, respectfully represents that said company desires aid from the town of Plainview aforesaid in the construction of its railroad, and for the purpose of obtaining such aid under the laws of this State makes and delivers to the town clerk of said town a definite proposition in writing as follows, viz: The amount of said bonds desired by said railroad corporation from said town, as such aid, is fifty thousand dollars, said bonds to be made payable and to mature in
17 twenty years from the date of the same, or, at the option of the said town, to be payable at any time prior to the maturity of the same after the year 1878. Said bonds shall bear interest at the rate of seven per cent. a year, payable, on the first day of January in each year, at the office of the treasurer of the State of Minnesota, and said bonds shall be executed in proper legal form, with interest coupons attached, and shall be delivered to said railroad company whenever and as soon as said railroad company shall have its line of railroad graded, the ties and iron laid thereon, with the cars running thereon from a point of junction with the Winona & St. Peter railroad, in the county — Olmsted, east of the west line of the town of Eyota,

in said county of Olmsted, to a point within the corporate lines of the village of Plainview, as the same existed on December 31, 1877, provided the same is completed during the year 1878, and to a station in said village within one hundred rods of the Plainview Hotel, in said village, now kept by John Bigham; and said railroad company will, in consideration of said bonds, at the election of said town, issue said town shares of its capital stock to the amount of fifty thousand dollars.

And if not so completed, with the cars running thereon, in the time above specified, then said bonds shall not be issued or delivered to said company and said town shall be free from any obligation to said railroad company.

Said petition will be appended to a copy of said proposition.

In testimony whereof the said Plainview Railroad Company have caused these presents to be signed by the president and secre-
18 tary of said company and sealed at the village of Plainview, Minnesota, this thirty-first day of January, A.D. 1878.

[OFFICIAL SEAL.] GEORGE W. VAN DUZEN,
President Plainview Railroad Company.
C. H. BLISS,
Secretary Plainview Railroad Company.

EXHIBIT "B."

Notice.

Notice is hereby given that after the 6th day of February, A. D. 1878, a petition to the proper authorities, viz., the town board of supervisors of the town of Plainview, in the county of Wabasha and State of Minnesota, will be presented to the resident tax-payers of said town for their signatures, asking said town board of supervisors, as such authorities of said town, to agree to the proposition, a copy of which is as follows:

EXHIBIT "C."

STATE OF MINNESOTA, } ss:
County of Wabasha, Town of Plainview, }

At a meeting of the town board of supervisors of the town of Plainview, in the county of Wabasha and State of Minnesota, held at the town clerk's office, in the village of Plainview, in said town, on the 30th day of March, A. D. 1878—present, T. G. Bolton, chairman; C. E. Daniels and S. Struble, supervisors—the following preamble and resolutions were adopted by said board:

19 Whereas the Plainview Railroad Company, a corporation existing and organized under the laws of the State of Minnesota, did, on the 31st day of January, A. D. 1878, make and file with the town clerk of said town of Plainview, in his office, a definite proposition in writing asking aid of the said town, by its bonds, in the sum of

fifty thousand dollars, to the construction of the railroad of the said company;

And whereas the said Plainview Railroad Company did, on the 31st day of January, A. D. 1878, post up at three of the public places in said town notices that after a day certain, named in said notice, to wit, after February 6th, A. D. 1878, a petition to the supervisors of said town, as the proper authorities of said town, appended to a copy of the said proposition, would be presented to the resident tax-payers of said town of Plainview, as shown by the last assessment-roll of said town, for their signatures, asking the said supervisors, as the proper authorities of said town, to agree to the said proposition filed with the town clerk as aforesaid, a true copy of said notice so posted, with proof of posting the same, being on file with the town clerk of said town;

And whereas, after the day named in the said notice, a petition, appended to a copy of said proposition, was presented to the resident tax-payers of said town, as shown by the last assessment-roll of said town, for their signatures, and was signed by a large number of said resident tax-payers, as appears by the affidavits of Asa Y. Felton, Daniel R. Sweezy, H. P. Wilson, the said petition and signatures thereto and the affidavits to the time of presentation and to the signatures of the persons signing the same being on file in the said town clerk's office;

And whereas it appears from the said petition and signatures thereto and the affidavits attached to the same and from the last assessment-roll of said town, certified copies of which we have carefully examined, that a majority of the resident tax-payers of said town of Plainview who were assessed for taxes upon real or personal estate in said town, as shown by the last assessment-roll of said town of Plainview, have signed the said petition and request;

And whereas it appears that the construction of the said road to be constructed by the Plainview Railroad Company, as set forth in the proposition of said company to the said town of Plainview, will promote the general prosperity and welfare of the tax-payers of the said town of Plainview:

Now, therefore, be it resolved by the board of supervisors of the town of Plainview, in said county, as the proper authorities of said town, That the said proposition of the Plainview Railroad Company to the said town, asking aid to the construction of said company's railroad by the bonds of said town in the sum of fifty thousand dollars, be, and the same is hereby, accepted and agreed to on the part of said town, so far as the issue of the bonds of said town to said railroad company on the terms and conditions in said proposition stated.

Resolved further, That the bonds of the said town of Plainview to the amount of fifty thousand dollars, executed in proper legal form, with interest coupons attached and payable as in said proposition requested, be, and the same are hereby, authorized and directed to be issued to the said Plainview Railroad Company whenever and as soon as the said company shall have its railroad completed, with the cars running thereon, as specified in said proposition.

Resolved further, That the issue of stock by the said Plainview Railroad Company to the town of Plainview, in said county, in consideration of the bonds of the said town in the amount of fifty thousand dollars, be, and hereby is, waived, and the said railroad company be, and hereby is, absolved from any and all obligations to issue the said stock, it being by us adjudged and determined that it will not be to the best interest of said town to accept or receive the said stock, and, on behalf and for said town of Plainview, we, the supervisors of said town, as the proper authorities thereof, do hereby relinquish any and all right to the issue
21 of the said stock of the said railroad company, and the reception of said stock is hereby declined and refused.

T. G. BOLTON, *Chairman.*
C. E. DANIELS,
S. STRUBLE,
Supervisors.

A. B. W. NORTON, *Town Clerk.*

EXHIBIT "D."

At a meeting of the board of supervisors of the town of Plainview, in the county of Wabasha, held at the town clerk's office of said town on the 18th day of March, A. D. 1879—present, T. G. Bolton, chairman, and S. Struble and E. C. Daniels—on motion, the following preamble and resolutions were unanimously adopted:

Whereas the Plainview Railroad Company did, on the 31st day of January, A. D. 1878, make a proposition to the town of Plainview for aid in the construction of its railroad in and by the bonds of said town in the sum of fifty thousand dollars, in consideration of which said railroad company undertook and agreed to construct its railroad from the Winona & St. Peter railroad to a point within the village of Plainview; and whereas said proposition was duly accepted by said town; and whereas said Plainview Railroad Company complied with the terms of said proposition on its part and constructed its said road as agreed and the cars now are and ever since Nov. 1st, A. D. 1878, have been running thereon: Therefore,

Resolved, That the town of Plainview issue to said Plainview Railroad Company its bonds in the sum of fifty thousand ($50,000) dollars, dated on January 1st, 1879, to become due on or before twenty years from date thereof, with interest thereon, payable annually, at seven per cent. per annum, and the chairman of this
22 board and the town clerk of said town are hereby directed to sign and issue such bonds for said town.

And resolved, That the issue of stock by said Plainview Railroad Company to said town in a corresponding amount be, and is hereby, waived.

T. G. BOLTON, *Chairman.*
C. E. DANIELS,
S. STRUBLE,
Supervisors.

EXHIBIT "E."

No. 2. UNITED STATES OF AMERICA. $500.

STATE OF MINNESOTA, *County of Wabasha, Town of Plainview.*

Know all men by these presents that the Town of Plainview, in the county of Wabasha, State of Minnesota, acknowledges itself indebted to the Plainview Railroad Company, a corporation existing under and by virtue of the laws of the State of Minnesota, in the sum of five hundred dollars ($500), which sum the said Town of Plainview hereby promises to pay to the said Plainview Railroad Company, or to the bearer hereof, at the office of the treasurer of the State of Minnesota or at such other place in said State as is or may be designated by law, on or before the first day of January, A. D. 1899, together with interest thereon from the date hereof until such principal sum shall be paid at the rate of seven per cent. per annum, which interest shall be payable annually on the first day of January in each year upon the presentation and surrender of the proper coupon annexed hereto.

23 This bond is issued in pursuance of a mutual agreement between the said town and the said railroad company, which agreement was made in accordance with the laws of the State of Minnesota and through and by a proposition made by said railroad company and duly accepted by said town upon petition therefor signed by a majority of the resident tax-payers of said town, said agreement having been fully performed by the said railroad company on its part.

This bond is issued in pursuance of the authority given for that purpose by the laws of the State of Minnesota and in compliance with a resolution of the board of supervisors of said town.

In testimony whereof the said Town of Plainview has executed this bond, by the chairman of the town board of supervisors and the town clerk of said town, at Plainview, this first day of January, A. D. 1879.

T. G. BOLTON,
Chairman of the Town Board of Supervisors of the Town of Plainview, State of Minnesota.

[SEAL.] (Signed) A. B. W. NORTON,
Town Clerk of said Town.

EXHIBIT "F."

$35. $35.

The Town of Plainview will pay to the holder hereof on the first day of January, 1899, at the office of the treasurer of the State of Minnesota or at such other place in said State as is or may be designated by law, thirty-five dollars for one year's interest on bond No. 2.

T. G. BOLTON, *Chairman.*
A. B. W. NORTON,
Town Clerk.

(Complaint verified.)

STATE OF MINNESOTA, } ss:
County of Wabasha, }

H. D. Wedge, of said county, being duly sworn, says he is the chairman of the board of supervisors of The Town of Plainview, the plaintiff in this action, and that the foregoing complaint is true to deponent's own knowledge, except as to those matters which are therein stated on his information and belief, and as to those matters he believes it to be true.

H. D. WEDGE.

Subscribed and sworn to before me this 16th day of September, A. D. 1884.

[NOTARIAL SEAL.] J. F. POPE,
Notary Public.

24 DISTRICT COURT, } ss:
Wabasha County, }

THE TOWN OF PLAINVIEW, Plaintiff,
against
THE WINONA & ST. PETER RAILROAD COMPANY, Defendant.

It is stipulated and agreed that the plaintiff may amend its complaint by inserting the following allegations after the 16th line of on page 5: Plaintiff further alleges that after the proceedings aforesaid and before the issue, making, or delivering of any of the bonds or coupons set out in the complaint herein an action was duly brought and instituted in the district court of the said State of Minnesota in and for the county of Wabasha, in said State, being the proper court of original jurisdiction therein, in which action one George W. Harrington, a resident citizen and tax-payer of said town of Plainview, was plaintiff and the said Supervisors of said Town, said Chairman of the Board of Supervisors, and said Town Clerk, as such officers, and said Town of Plainview, and the Plainview Railroad Company aforesaid were defendants, upon the matters and facts hereinbefore set out, the object and purpose of which action was to have said town officers enjoined perpetually from issuing and said Plainview Railroad Company from receiving or obtaining any of said bonds or coupons hereinafter set forth on the ground that section 7 of chap. 106, Laws 1877, being the act under and pursuant to which all said foregoing proceedings were had, was and is unconstitutional and said proceedings thereunder wholly invalid.

That in said action summons was duly served on all the defendants therein, and all the defendants therein duly appeared and answered and defended therein, and said State court obtained and had full and complete jurisdiction therein, both of the subject-matter and of the parties thereto.

That thereupon, issue being duly joined therein, said action was duly tried and determined on its merits and judgment entered therein; that said case was duly appealed to the supreme court of the State of Minnesota and duly tried and determined by said supreme court, by which said supreme court it was, on the 6th day of

October, 1880, duly determined, adjudged, and decreed therein
25 that said section 7 of the aforesaid act was and is unconstitutional and void, and that all said proceedings are and were invalid, and that neither said town officers or the town of Plainview has or had any power or authority to issue said bonds or coupons or any of them or said Plainview Railroad Company to receive them; which judgment remains in full force.

The said allegations and amendment to be considered as fully in issue without answer thereto.

F. B. KELLOGG,
C. K. DAVIS,
Pl'ff's Att'ys.
THOMAS WILSON.
Def't's Att'y.

Endorsed: District court, Wabasha county. The Town of Plainview ag'st The Winona & St. Peter Railroad Company. Amended complaint. Filed June 26th, 1885. Chas. J. Stauff, clerk.

26 *Answer.*

STATE OF MINNESOTA:

District Court, Third Judicial Dist.

THE TOWN OF PLAINVIEW
vs.
THE WINONA & ST. PETER RAILROAD COMPANY.

The defendant answers to the complaint:

I.

That, except as hereinafter admitted, it denies the same and each and every allegation and part thereof.

II.

That it admits to be true the matters and facts alleged in the first page of the complaint, and it admits and alleges that on the 31st day of January, 1878, the Plainview Railroad Company made and delivered to A. B. W. Norton and caused to be filed with him as town clerk of said town of Plainview, in pursuance of and in conformity with the provisions of section 4 of chapter 106 of the General Laws of 1877 a definite proposition in writing, signed by the president and secretary of said railroad company and sealed with its seal, which proposition contained a statement of the amount of bonds desired, viz., $50,000, the time when payable, viz., twenty years from the date of the same, and that the same were payable before maturity, at the option of the said town; the rate of interest they should bear, viz., seven per cent. per annum; and said proposition also contained a statement specifying when said bonds were to be delivered, with reference to the time of construction of the said railroad, viz.,

whenever and as soon as said railroad company should have its line of railroad graded, the ties and iron laid thereon, with cars running thereon, from the point of junction with the Winona & St. Peter railroad in the county of Olmsted east of the west line of the town of Eyota, in said county of Olmsted, to a point within the corporate limits of the village of Plainview as the same existed on
27 December 31st, 1877, provided the same should be completed during the year A. D. 1878; that a substantial copy of said proposition is appended to the complaint and is referred to and made a part of this answer, and the said town clerk immediately on the filing of such proposition endorsed thereon the date of its receipt by him and did forthwith transcribe the said proposition into a record book of said town.

III.

That within three months after the filing of said proposition with the said town clerk, to wit, on the 31st day of January, 1878, the Plainview Railroad Company caused notice to be given, as prescribed in the fifth section of said chapter one hundred and six of the General Laws of the year 1877, in three public places in said town of Plainview, stating that after the sixth day of February, A. D. 1878, a petition to the proper authorities of said town, viz., to the board of supervisors of said town, of Plainview would be presented to the resident tax-payers of said town for their signatures, asking said town board of supervisors as such authorities of said town to agree to the proposition aforesaid, a copy of which was attached to said notice, and a substantial copy of which notice and proposition is attached to the complaint herein and referred to as a part of this answer.

That the said railroad company caused said notice, with a copy of the proposition aforesaid thereto attached, to be duly posted in three public places in said town on the 31st day of January, A. D. 1878, and to be published for two successive weeks in the "Plainview News," a weekly paper printed and published in said town of Plainview.

28 That the day of the first publication of the said notice was the sixth day of February, 1878, and the day of the second publication was the 13th day of February, A. D. 1878.

IV.

That within four months after the filing of said proposition as aforesaid with the said town clerk, to wit, on the 30th day of March, 1878, the Plainview Railroad Company delivered to said town clerk substantial copies of said proposition so filed with such petition to the proper authorities of said town asking such authorities to agree to such proposition appended thereto, bearing the signature of a majority of the persons residing in said town who were assessed for taxes upon real or personal estate in such town, as shown by the last assessment-roll of the said town, which signatures were verified by the affidavits of a person witnessing said signatures.

That said petitions were presented to and signed by the persons

whose names are attached thereto, between the 7th day of February, A. D. 1878, and on and prior to the 15th day of March, A. D. 1878. Said petition is in the following words and figures:

"*Petition.*

To the town board of supervisors of the town of Plainview, in the county of Wabasha and State of Minnesota:

We whose names are hereto subscribed, being residents of said town, and who were assessed for taxes upon real or personal estate in said town, as shown by the last assessment-roll of said town, respectfully ask you, as the proper authorities of said town, to agree to the proposition of the Plainview Railroad Company to which this petition is appended.

Dated this 7th day of January, 1878."

V.

29 That on the 30th day of March, A. D. 1878, and after all the steps aforesaid had been taken and all the acts aforesaid done, the board of supervisors of the said town of Plainview held a meeting at the office of the town clerk of the said town, at which were present all the supervisors of said town and the said town clerk, and at such meeting the said board of supervisors determined and adjudged, among other things, as the fact was and is, "that a majority of the resident tax-payers of said town of Plainview who were assessed for taxes upon real or personal estate in said town, as shown by the last assessment-roll of said town of Plainview, had signed said petition and request," and resolved, determined, and adjudged "that the said proposition of the Plainview Railroad Company to the said town asking aid to the construction of said company's railroad by the bonds of said town in the sum of fifty thousand dollars be, and the same is hereby, accepted and agreed to on the part of the said town, so far as the issue of the bonds of said town to said railroad company on the terms and conditions in said proposition stated;" and resolved further "that the bonds of the said town of Plainview, to the amount of fifty thousand dollars, executed in proper legal form, with interest coupons attached and payable as in the said proposition requested, be, and the same are hereby, authorized and directed to be issued to the said Plainview Railroad Company whenever and as soon as the said company shall have its railroad completed, with the cars running thereon as specified in said proposition;" and resolved further "that the issue of stock by the said Plainview Railroad Company to the town of Plainview, in said county, in consideration of the bonds of said town, in the
30 amount of fifty thousand dollars, be, and the same is hereby, waived, and that the said railroad company be, and is hereby, absolved from any and all obligations to issue the said stock."

"It being by us adjudged and determined that it will not be to the best interest of the said town to accept or receive the said stock, and on behalf of and for said town of Plainview we, the supervisors of

said town, as the proper authorities thereof, do hereby relinquish any and all right to the issue of said stock of the said railroad company, and the reception of said stock is hereby declined and refused."

And the Plainview Railroad Company has not issued or delivered or offered to issue or deliver any of its stock to said town, for the reason that the supervisors of said town, deeming it for the interest of such town to do so, waived the issuance and delivery of said stock.

VI.

That exhibit — attached to the complaint is a substantial copy of the resolutions adopted by said board of supervisors at the meeting last above referred to, except that the word "July" in said exhibit should be, and in the original resolution was and is, "February."

VII.

That, relying on and induced and influenced by the said several acts and doings, and particularly by the said resolution of the said board of supervisors, the Plainview Railroad Company constructed and had before the issue of the bonds of said town constructed its line of road and had the same graded and the ties and iron laid thereon, with the cars running thereon, from a point of junction with the Winona & St. Peter railroad in the county of Olmsted
31 east of the west line of the town of Eyota, in said county of Olmsted, to a point within the corporate limits of the village of Plainview as the same existed on December 31st, 1877, and in all respects complied with the terms and conditions specified in said proposition by it to be performed.

VIII.

That defendant is informed and believes that after the said road was built and the said proposition in all respects complied with by the said Plainview Railroad Company the supervisors of said town adopted a resolution or series of resolutions, a substantial copy of which is annexed to the complaint herein and marked Exhibit "D."

IX.

That defendant is informed and believes that thereupon the bonds of the said town of the par value of $50,000, of the denomination stated in the complaint, with interest coupons attached as stated in the complaint, were issued by the said town, and that the same were delivered, transferred, and negotiated as hereinafter alleged, and that Exhibit "E," attached to the complaint, is a substantial copy of each of said bonds, and Exhibit "F," attached to the complaint, is a substantial copy of the coupons attached to said bonds, and that the bonds and coupons herein referred to are the same referred to in the complaint herein.

X.

That prior to the 10th day of May, A. D. 1878, Geo. W. Van Dusen was the owner of all the stock of the said Plainview Railroad Company and had the control of the said corporation and all of its property, and on the day last aforesaid, for the purpose of in-
32 ducing the Chicago & Northwestern Railway Company, a corporation created and existing under the laws of the States of Illinois and Wisconsin, to build or to advance money to aid in the building of the said road, he represented to the Chicago & Northwestern Railway Company that he had obtained aid, to be paid to the said Plainview Railroad Company by this plaintiff and other towns upon the completion of said road in a given time and manner as agreed upon, and that he had procured right of way for said road and done certain other acts and things requisite and necessary to be done for the completion of said road; and he then and there, for a valuable consideration to him paid, represented and agreed, among other things, that he would cause to be issued to the said Chicago & Northwestern Railway Company said bonds and transfer to it said right of way and other property and rights which he had acquired, which were necessary for the building of the said road, in case it would advance and furnish money necessary to aid in the building of and completion of said road; that it (said Chicago & Northwestern Railway Company), induced and influenced by the said representation and agreements and believing and relying thereon, accepted said offer and complied with said request and advanced large sums of money in the building of the said line of road, and the said line of road was, by the use of the money, built, equipped, and put in operation within the time and in the manner specified in the proposition made to the plaintiff by the said Plainview Railroad Company as aforesaid; and thereafter and in pursuance of the agreement and understanding aforesaid the bonds of the plaintiff were issued and delivered to the Chicago & Northwestern Railway Company,
33 and the said Plainview Railroad Company did not nor did any of its officers sell or negotiate the said bonds or any of them to any person or company or receive any consideration therefor, nor was there any consideration paid therefor by the said Chicago & Northwestern Railway Company, except the money advanced by it to aid in the building of the said line of road, which money was advanced and furnished by the last-named company long prior to the time when said bonds were issued by the plaintiff; and this defendant alleges, upon information and belief, that when and up to the time the said bonds were issued and when and up to the time they were delivered to the said Chicago & Northwestern Railway Company the said Geo. W. Van Dusen and the Plainview Railroad Company and its officers and the Chicago & Northwestern Railway Company and its officers and the officers of the plaintiff town believed that the law under which said bonds were issued was valid and constitutional, and that all the steps taken under said law as conditions precedent to the issuance of the said bonds were legally taken, and that every

act and thing proper or necessary to be done in order to comply with the laws of the State and with the said proposition of said Plainview Railroad Company in order to authorize and make valid the issue of said bonds had been done, and that said bonds were legally issued; and this defendant believes none of said persons did or omitted to do any act in the premises with the intent or purpose to cheat or injure the plaintiff town, but, on the contrary, that they and each of them believed that they had a right, legally and equitably, to take each and every step taken and to do each and every act
34 done in the premises as aforesaid; and this defendant particularly alleges that the said Plainview Railroad Company did not nor did any of its officers or agents negotiate or sell or dispose of or transfer said bonds or coupons or any of them, nor did it or they permit or consent to any such sale, transfer, or disposal with a view to injure or cheat the plaintiff town or to place said bonds in the hands of a *bona fide* purchaser for value, or so as to give any advantage whatever to the holders of such bonds or coupons in the collection thereof, or so as or with any view to put the plaintiff at a disadvantage in any suit on or to collect any of such bonds or coupons.

And this defendant alleges that when and long before the said bonds were transferred to the Chicago & Northwestern Railway Company it (said Chicago & Northwestern Railway Company) had due notice and knowledge of all the facts which could in any manner affect the validity of the said bonds and of the law under which they were issued and of the provisions of the constitution and of the statutes of Minnesota which it is alleged affect their validity, and it had also notice and knowledge that they were issued under and in pursuance of a petition of the tax-payers of said town under and in pursuance of the provisions of section 7 of chapter 106 of the General Laws of Minnesota for the year 1877.

XI.

That the line of road of the said Plainview Railroad Company was in process of construction for a long time prior to the time when said bonds were issued, and it was during all such time well known by the officers of the plaintiff town and generally by the resi-
35 dents and tax-payers of the said town—as the fact was—that the said road was being built and the money advanced to aid in the building thereof on the faith and belief that the aid promised thereto by the plaintiff town and other towns as aforesaid would be thereby earned and secured, and until after the said road was fully completed no objection was made by any one to the issuance of said bonds.

XII.

That after said bonds were issued as aforesaid, and after some of them had been sold and negotiated by the said Chicago & Northwestern Railway Company, to wit, in the year A. D. 1881, Samuel Marshall and Charles F. Ilsley, being then owners of some of the

overdue coupons attached to said bonds, brought suit in the circuit court of the United States in and for the district of Minnesota against the plaintiff to recover the sum due on said coupons; that in said suit this plaintiff appeared and defended on the ground that said bonds were not legally issued and that the law under and in pursuance of which they were issued was unconstitutional.

That said court had jurisdiction of the parties to said suit and of the cause of action, and at the June term of the said court, in said year 1881, judgment was rendered in said action in favor of the plaintiff and against the defendant, in and by which it was held and adjudged that the said bonds were legally issued and that they were valid and binding obligations of the said town, this plaintiff.

Said judgment is in full force and unreversed.

XIII.

36 That the road of the said Plainview Railroad Company was mortgaged for the sum of one hundred thousand dollars ($100,000) on the first day of September, A. D. 1878, which sum becomes due — payable on the first day of September, A. D. 1908, and bears interest at the rate of seven per cent. per annum, payable annually, and that no part thereof has been paid; but the same and the whole thereof was at the time this defendant purchased said line of road and is a valid existing lien and incumbrance on the property and franchises of the said Plainview Railroad Company.

XIV.

That on the 11th day of May, A. D. 1881, this defendant, The Winona & St. Peter Railroad Company, purchased the stock, property, and franchises of the said Plainview Railroad Company, and ever since has owned the same; that the said property and franchises so purchased were not then and have not since been and are not now worth any sum or of any value in excess of the incumbrance thereon as aforesaid.

XV.

That the said Samuel Marshall and Charles F. Ilsley, who purchased some of the said bonds and coupons, had, when they purchased the same, notice and knowledge of the terms of the law under which they were issued and of the proceedings had as a condition precedent to their issue; and this defendant denies that they have or had or could in law have any greater right to recover thereon than the Plainview Railroad Company would have if it owned said bonds; and this defendant denies that the plaintiff has been or
37 is or could be by the transfer of said bonds or coupons deprived of any defense which it could have as against the Plainview Railroad Company.

Wherefore the defendant prays judgment that this action be

dismissed, and that it recover of the plaintiff its costs and disbursements herein.

THOMAS WILSON,
Defendant's Attorney, Winona, Minn.

Answer Verified.

STATE OF MINNESOTA, }
County of Winona, } ss:

Thomas Wilson came before me personally and, being duly sworn, doth say that he is attorney for the above-named defendant in the above-entitled action; that the foregoing answer is true of his own knowledge, except as to those matters therein stated on his information and belief, and as to those matters that he believes it to be true; that the reason why it is verified by affiant is that the officers of defendant having knowledge of the facts are absent from this county.

THOMAS WILSON.

Subscribed and sworn to before me on this 31st day of October, A. D. 1884.

W. A. ALLEN,
Notary Public, Winona Co., Minn.

38 *Reply.*

STATE OF MINNESOTA, }
County of Wabasha, } ss:

District Court, Third Judicial District.

THE TOWN OF PLAINVIEW, Pl'ff,
against
THE WINONA & ST. PETER RAILROAD COMPANY, Def't.

The plaintiff, for reply to the defendant's answer herein, alleges and admits that the Plainview Railroad Company made and delivered to the town clerk of the town of Plainview the proposition as therein alleged, and that said proposition was filed with the town clerk and transcribed in the records of the town clerk, as alleged in the complaint and not otherwise.

Plaintiff admits that the Plainview Railroad Company gave the notice by posting the same in three public places in the town of Plainview and by publishing the same in the Plainview News, as in the said answer alleged.

The plaintiff admits that within four months after the filing of said proposition with said town clerk the Plainview Railroad Company delivered to said town clerk certain petitions to the town board of supervisors of said town, with substantial copies of said proposition of said copies thereto attached, which said petitions, when so filed, bore the signatures of tax-payers of said town, as in said complaint alleged, and not otherwise.

And plaintiff denies that any petition or petitions bearing the signatures of the resident tax-payers of said town or any of
39 them relative to said matter was ever made or filed in the said town clerk's office, except as in the complaint alleged.

Plaintiff admits that the supervisors of said town, on the 30th day of March, 1878, adopted the resolution as in said complaint alleged, and not otherwise, except that the word "July" in said resolution should be "February," and admits that they afterwards passed a resolution or series of resolutions marked Exhibit "D" in said complaint, and admits that the Plainview Railroad Company built and constructed its railroad and had its cars running thereon, as in the complaint alleged, and complied with the terms and conditions specified in its proposition filed with the town clerk of said town of Plainview, as alleged in said complaint, and not otherwise.

Plaintiff admits that the said line of railroad was in process of construction during the summer prior to issuing the said bonds, and admits that the road of the said Plainview Railroad Company was mortgaged for the sum of one hundred thousand dollars, but as to whether said mortgage was at the time the defendant purchased the said line of road a valid existing lien and incumbrance on the property and franchises of the said Plainview Railroad Company, and as to whether the same remains unpaid or was at the time of said purchase unpaid, this plaintiff has no knowledge or information sufficient to form a belief.

The plaintiff admits that on the 11th day of May, 1881, the defendant purchased the stock, property, and franchises of the said Plainview Railroad Company and ever since has owned the same.

The plaintiff admits that Samuel Marshall and Charles F.
40 Ilsley brought suit against the said town of Plainview in the United States circuit court of the district of Minnesota and recovered judgment, as in the complaint alleged, and not otherwise.

Further replying, this plaintiff denies each and every other allegation or part of allegation, matter, or thing in said answer contained.

Wherefore the plaintiff demands judgment as in the complaint contained.

KELLOGG & EATON AND
C. K. DAVIS,
Attorneys for Plaintiff.

STATE OF MINNESOTA, } ss:
County of Olmsted, }

Frank B. Kellogg, of said county, being duly sworn, says he is one of the attorneys of the plaintiff in this action; that the plaintiff and all its officers are absent from the county of Olmsted, where this deponent resides, and that the foregoing reply is true to the best of deponent's knowledge, information, and belief.

FRANK B. KELLOGG.

Subscribed & sworn to before me this 10th day of November, A. D. 1884.

[NOTARIAL SEAL.] BURT W. EATON,
Notary Public.

41 District Court, Wabasha County, State of Minnesota, 3d Judicial District.

THE TOWN OF PLAINVIEW
versus
THE WINONA & ST. PETER RAILROAD COMPANY.

This cause came on for trial at Wabasha, Minnesota, on the 2nd day of July, A. D. 1885, Hon. L. W. Collins, district judge, presiding, Hon. C. K. Davis and F. W. Kellogg, Esq., appearing for the plaintiff, and Thomas Wilson, Esq., for defendant.

Plaintiff's counsel offered and read in evidence stipulation of facts, a copy of which is hereto annexed, marked Exhibit "A."

Plaintiff's counsel also offered and read in evidence certified copy of deed of conveyance from the Plainview Railroad Company to the Winona & St. Peter Railroad Company, dated May 11th, A. D. 1881, acknowledged the same day, and recorded in the county of Olmsted April 6th, 1885, Book 53 of Deeds, 403, marked Exhibit "B," which is hereto annexed.

To which defendant's counsel objected as incompetent, irrelevant, and immaterial. The court overruled the objection and received the evidence; to which ruling defendant duly excepted.

Plaintiff's counsel also offered and read in evidence stipulation of facts, a copy of which is hereto annexed, marked Exhibit "C," and made a part of this case.

Plaintiff's counsel also offered and read in evidence a stipulation that the case in the United States circuit court first brought
42 by Marshall and Ilsley against this plaintiff was taken to the Supreme Court of the United States and dismissed, because the amount in controversy did not exceed $5,000, a copy of which is annexed, marked Exhibit "D."

Plaintiff's counsel also offered and read in evidence certified copy of the record of the supreme court, State of Minnesota in the case of George W. Harrington, appellant, against The Town of Plainview *et al.*, respondents, a copy of which is annexed hereto, marked Exhibit "E."

To which counsel for defendant objected as incompetent, irrelevant, and immaterial, and that it should be followed by any subsequent proceedings had. The court overruled the objection and received the evidence; to which ruling defendant's counsel duly excepted.

Plaintiff's counsel also offered and read in evidence the original record of this court in the same case, including bond on appeal and order denying new trial and judgment-roll, all of which are included in Exhibits "C," "E," and "Y," hereto annexed; to each of which defendant's counsel objected as incompetent, irrelevant, and

immaterial. The court overruled the objection and received the evidence; to which ruling defendant's counsel duly excepted.

Plaintiff's counsel also offered and read in evidence the mandate from the supreme court in the same case. Also the transcript of the judgment of the supreme court filed February 10th, 1881, marked Exhibit "F" (a copy of which is hereto annexed, marked Exhibit "F"). Also notice of appeal to supreme court from the judgment rendered in the Harrington case, filed September 13th, 1879. Also the bond on said appeal, filed September 15th, 1879, with all
43 indorsements on said papers, copies of all of which are included in Exhibits "C," "E," and "Y," hereto annexed; to each and all of which, separatly, the defendant's counsel objected on the ground that the same are incompetent, irrelevant, and immaterial. The court overruled the objection and received the evidence; to which ruling the defendant's counsel duly excepted.

Plaintiff's counsel also offered and read in evidence certified copy of the record of the Supreme Court of the proceedings on appeal by Harrington from the final judgment in Harrington *vs.* The Town of Plainview, a copy of which is annexed hereto and marked Exhibit "Y."

To which the defendant's counsel objected as incompetent, irrelevant, and immaterial. The court overruled the objection and received the evidence; to which ruling the defendant's counsel duly excepted.

Plaintiff's counsel also offered in evidence exemplification of the record in a suit commenced in the circuit court of the United States for the district of Minnesota, by Marshall and Ilsley against the Town of Plainview (one of these plaintiffs), to recover on some of the coupons in question, which was marked Exhibit "G." Said record so offered contains, viz., complaint in said action, summons and return on summons, answer, order to file reply *nunc pro tunc*, reply, and stipulation waiving jury trial, stipulation of facts, *stipulation of facts*, minutes of argument, opinion of court, order for judgment, judgment, taxation of costs.

The complaint is in the following words and figures:

44 "Circuit Court of the United States for the District of Minnesota.

SAMUEL MARSHALL and CHARLES F. ILSLEY, Plaintiffs,
vs.
THE TOWN OF PLAINVIEW, Defendant.

The complaint of the above-named plaintiffs respectfully shows to this court that they reside at the city of Milwaukee, in the State of Wisconsin, and that they are citizens of said State; that the said defendant, The Town of Plainview, of the county of Wabasha, in the State of Minnesota, is a body corporate and politic created and existing under and by virtue of the laws of the State of Minnesota, and that it is a citizen thereof.

That the said defendant, being duly authorized by the laws of the

State of Minnesota, on or about the first day of January, A. D. 1879, for value received, made, executed, and delivered its certain bond or writing obligation, in compliance with a resolution of the town board of supervisors of said town, signed by the chairman of the said town board of supervisors and by the town clerk of said town and sealed with the seal of said town, being numbered two of a series of 100 such bonds, wherein and whereby the said Town of Plainview, the defendant in this action, acknowledged itself indebted to the Plainview Railroad Company, a corporation created and existing under and by virtue of the laws of the State of Minnesota, in the sum of five hundred dollars, which sum the said defendant therein and thereby promised to pay to the said Plainview Railroad Company or to the bearer thereof, at the office of the treasurer of the State of Minnesota or at such other place in said State as was or might be designated by law, on or before the 1st day of January, A. D. 1899, together with interest thereon from the date thereof until such principal sum should be payable, annually, on the first day of January in each year, upon the presentation and surrender of the proper coupon annexed thereto; that at the time of the execution and delivery of said bond twenty coupons, for the sum of thirty-five dollars each and each bearing date and each being for the interest on said bond for each of said years intervening between the date of said bond and the time for the maturity thereof, were annexed to said bond and were each issued therewith and signed on behalf of said town by the chairman of its town board of supervisors and by its town clerk, and whereby the said town, the defendant, promised to pay, on the first day of January of each year during the time said bond had to run, the sum of thirty-five dollars to the holder of each of said coupons, at the office of the treasurer of the State of Minnesota or at such other place in said State as was or might be designated by law, for one year's interest on said bond; that the plaintiffs are now the lawful holders, owners, and bearers of said bond and of all the said coupons which were so annexed to said bond, except the one that matured January 1st, 1880; that the said defendant has not paid the annual interest maturing on said bond on the first day of January, A. D. 1881, amounting to the sum of thirty-five dollars, at the office of the treasurer of the State of Minnesota or at any other place designated by law, or elsewhere, or any part thereof, although requested so to do, but to pay the same or any part thereof to the said plaintiffs, although they then and have ever since held the proper coupon therefor annexed to said bond and was and ever since have been ready to surrender the same upon the payment of the said interest so due and unpaid on said bond, the defendant has hitherto refused; that there is now due and unpaid on said bond to the plaintiffs, the said sum of thirty-five dollars, with interest thereon from the first day of January, A. D. 1881."

(Here follow 16 other separate causes of action set out in the same language as the foregoing first count or first cause of action, except in the number of the bond.)

"Eighteenth. And for a further and separate cause of action the said plaintiffs show that the said defendant, being thereto duly authorized by the laws of the State of Minnesota, on or about the first day of January, A. D. 1879, made and executed, for value received, its negotiable coupon or interest warrant, duly
46 signed by the chairman of its town board of supervisors and by its town clerk, of which coupon or interest warrant the following is a copy, to wit:

$35. $35.

The Town of Plainview will pay to the holder hereof, on the first day of January, 1881, at the office of the treasurer of the State of Minnesota or at such other place in said State as is or may be designated by law, thirty-five dollars for one year's interest on bond No. 19.

T. G. BOLTON, *Chairman.*
A. B. W. NORTON, *Town Clerk.*

That said coupon or interest warrant was, on or about the first day of January, A. D. 1879, duly delivered with said bond, which the said defendant then duly issued under and by virtue of the laws of the State of Minnesota to the Plainview Railroad Company, a corporation created and existing under the laws of the State of Minnesota; and the said plaintiffs are now the lawful owners and holders of said coupon or interest warrant, and that the said defendant has not paid the said sum of thirty-five dollars therein specified, at the office of the treasurer of the State of Minnesota or at any other place designated by law, or elsewhere, although requested so to do, but to pay the same or any part thereof the said defendant hath hitherto wholly refused and doth still refuse; that there is now due and unpaid the said plaintiffs on the said coupon or interest warrant the said sum of thirty-five dollars, with interest thereon from the first day of January, A. D. 1881."

(Here follow 28 other separate causes of action set out in the same words and figures as the foregoing eighteenth cause of action, except in the number referring to bond.)

"Wherefore the said plaintiffs demand judgment against said defendant for the sum of one thousand six hundred and ten
47 dollars, with interest thereon from the first day of January, A. D. 1881, besides the costs and disbursements of this action.

S. U. PINNEY,
Pl'ff's Att'y, Madison, Wis.

Messrs. Rogers & Rogers, St. Paul, Minn., agents.

To the above-named defendant and its attorneys:

Take notice that the bonds and coupons of which the following are true copies are the written instruments upon which the foregoing forty-six causes of action are founded and will be given in evidence on the trial of this action in support thereof, so far as the first seventeen causes of action are concerned, and that as to the re-

maining twenty-nine causes of action in said complaint stated true copies of the written instrument upon which each of the same is founded is set forth in words and figures at length in each of said twenty-nine causes of action respectively.

S. U. PINNEY,
Plaintiff's Attorney."

(Here follow copies of bonds, No. 2 to 18, inclusive, and of the coupons (19 in number attached to each), a true copy of which bonds (except the number) and of said coupons (except the date on which such interest is to be paid) is annexed to the complaint to this action.)

The answer is in the following words and figures:

United States Circuit Court, District of Minnesota.

SAMUEL MARSHALL and CHARLES F. ILSLEY, Plaintiffs,
vs.
THE TOWN OF PLAINVIEW, Defendant.

Said defendant answers to the complaint of said plaintiffs and to each and every allegation, count, and separate cause of action set forth in said complaint as follows, to wit: Defendant admits that it is, and during all the time mentioned in the complaint has been, an organized town and municipal corporation of and within the State of Minnesota, and that the residence and citizenship of the parties to this action is as set forth in the complaint. Defendant also admits that each and all of the printed instruments and
48 obligations set forth and declared upon and in said complaint, and which on their face purport to be the negotiable bonds and coupons of this defendant, were signed by the then chairman of the board of supervisors and town clerk of this defendant, as such chairman and town clerk, and delivered to the Plainview Railroad Company, which then was and still is a railroad corporation organized under and by virtue of the statutes of the State of Minnesota, which pretended bonds and coupons were all so signed and delivered in the manner and under the authority and circumstances hereinafter stated, and not otherwise; and defendant denies that said bonds and coupons or any of them were ever made, executed, or delivered by defendant or by its authority or in any other manner save as hereinafter fully stated; and defendant denies that it or the said chairman of its board of supervisors or its town clerk were ever lawfully authorized or empowered to make, execute, or deliver said bonds and coupons or any of them, and denies that the same were ever made, executed, or delivered under or pursuant to authority conferred by any law of the State of Minnesota save only as hereinafter fully and particularly set out. Further answering, defendant alleges that each and all of said bonds and coupons were so made and executed and delivered by said chairman of the board of supervisors and said clerk of defendant under and pursuant to the pretended authority and provisions of section seven of

chapter 106 of the General Laws of the State of Minnesota for the year 1877, said chapter being an act of the Legislature of the State of Minnesota, approved March 5th, A. D. 1877, entitled "An act to authorize municipal corporations to aid in the construction of railroads," and by virtue of certain pretended proceeding and pursuant to said section seven of said act, as hereinafter stated, and in no other manner and by no other authority whatever, and defendant hereby refers to said act and said section seven thereof as part of this answer; that on or about the 31st day of January, A. D. 1878, the said Plainview Railroad Company made and delivered to the then town
49 clerk of said town (this defendant) a definite proposition in writing, signed by the president and secretary of said railroad company and sealed with its seal, containing all the statements and specifications prescribed by section four of the aforesaid act and stating the amount of bonds desired to be fifty thousand dollars, and said town clerk immediately endorsed on said proposition the date of the filing thereof, and on the 30th day of March, A. D. 1878, said proposition was transcribed and recorded in the record book of said town; that within three months after the filing of said proposition with said town clerk, to wit, on the 31st day of January, A. D. 1878, said Plainview Railroad Company caused notice to be given, posted, and published as provided by said act, stating that, after the sixth day of February, A. D. 1878 (more than five days after the date of said notice), a petition to the proper authorities of said town (this defendant) would be presented to the resident tax-payers of said town for their signatures, asking such authorities to agree to such proposition, a copy of which was attached to said notice and posted and published therewith; that within four months after said filing of said proposition with said town clerk, to wit, on the 30th day of March, A. D. 1878, said railroad company delivered to said town clerk substantial copies of said proposition so filed with such petition, in matter and form as provided by said section seven of said act, appended thereto, bearing the signatures of a majority of the persons residing in said town of Plainview who were assessed for taxes upon real or personal estate in said town, as shown by the then last assessment-roll thereof, which signatures were verified by the affidavits of persons witnessing such signatures; that many of the said resident tax-payers of said town whose signatures were so upon said petition were not electors or legal voters in said town or at all, some of them being women, and others being minor persons, and still others being partnership firms, paying taxes as such firms, but that said petition and the signatures thereto were made and ob-
50 tained in accordance with and under and pursuant to the provisions of said section seven of the aforesaid act and not otherwise; and this defendant avers that the aforesaid section seven of said act and the aforesaid proceedings and acts thereunder constituted were and are the only basis, power, or authority ever conferred upon or obtained by the supervisors of said town or the chairman of the board of supervisors or the town clerk thereof to issue, make, execute, or deliver or direct the issuing,

making, execution, or delivery of any of said bonds or coupons or any bonds or coupons whatever, and that no election was ever called or held or other proceedings of any kind ever had or attempted to authorize the supervisors of said town or any officer thereof to issue, make, execute, or deliver or authorize the issuing, making, execution, or delivery of said bonds or coupons or any bonds or coupons except as hereinbefore fully recited.

That after said petition of resident tax-payers of said town so signed and bearing such signatures of a majority of such resident tax-payers of said town so verified and having appended thereto substantial copies of said proposition was so delivered to and was filed by said town clerk, to wit, on said 30th day of March, A. D. 1878, the then board of supervisors of said town, having no power or authority so to do save only as hereinbefore recited, adopted a resolution reciting in substance the proceedings hereinbefore recited and none other, and pretending to accept and agree to the said proposition of said railroad company and to direct the issue of said bonds and coupons, according to the terms of said proposition, and to waive the issuance by said railroad company to said town of any stock of said railroad company, and declining and refusing to accept any such stock thereof, which resolution was entered on the record book of said town. True copies of said notice, proposition, petition (except the signatures and verifications of signatures of the petitioners, which are omitted because of their voluminousness), and of said res-
51 olution are hereto attached and hereby referred to as a part of this answer.

Defendant further alleges that after all the proceedings aforesaid and before the issue, making, or delivery of any of the bonds or coupons set out in the complaint herein an action was duly begun and instituted in the district court of the said State of Minnesota in and for the county of Wabasha, in said State, being the proper court of original jurisdiction therein, in which action one George W. Harrington (a resident citizen and tax-payer of said town) was plaintiff and the said supervisors of said town, said chairman of the board of said supervisors, and said town clerk, as such officers, respectively, and said The Plainview Railroad Company and this defendant were defendants, upon the matters and facts hereinbefore set out, the object and purpose of which action was to have said officers of defendant enjoined perpetually from issuing and said railroad company from receiving or obtaining any of said bonds or coupons, on the ground that said section seven of the aforesaid act, under and pursuant to which alone all said proceedings were so had and done, was and is unconstitutional and void and said proceedings thereunder wholly invalid; that in said action summons was duly served on all the defendants therein herein, and all the defendants therein duly appeared and answered and defended therein, and said State court obtained and had full and complete jurisdiction therein, both of the subject-matter of said action and all of the parties thereto; that thereupon, issue being duly joined therein, said action was duly tried and determined on its merits and judgment entered therein, from which an appeal was duly taken and

perfected to the supreme court of said State and duly tried and determined by said supreme court, by which supreme court it was, on or about the sixth day of October, A. D. 1880, duly determined, adjudged, and decreed therein that said section seven of the aforesaid act was and is unconstitutional and void, and that all said
52 proceedings are and were invalid, and that neither said town officers nor the defendant had or has any power or authority to issue said bonds or coupons or any of them, which judgment remains in full force.

Defendant further alleges that on the 6th day of March, A. D. 1879, said section seven of the aforesaid act was duly repealed by the Legislature of the State of Minnesota in and by the provisions of chapter seventy-two of the General Laws of said State for the year 1879, to which reference is hereby made.

Defendant further alleges that afterward and during the pendency of the said section in said State court, to wit, on or about the 19th day of March, A. D. 1879, said chairman of the board of supervisors of said town and said town clerk thereof, without any power or authority so to do, save that hereinbefore set forth, did, in pursuance of said section seven of said act of March 5th, 1877, and of said unconstitutional and invalid proceedings hereinbefore recited and not otherwise, make, execute, and deliver to said The Plainview Railroad Company, at its request, all the bonds and all the coupons in the complaint described and declared upon, and all the bonds from which all the coupons described in the complaint have been detached, all of which bonds and coupons were then made to bear date as in the complaint set forth; that each and all of said bonds and each and all of said coupons in the complaint set forth were and are a part of one and the same issue or series of bonds and coupons then so executed and delivered as above stated and none other, being a series of one hundred bonds, with interest coupons attached, each and every one of which bonds were and are of the same form and substance and contain upon their face all and the same recitals as those which are set forth in the complaint herein, and copies of which are attached to said complaint, and that all the coupons set up in said complaint were so issued, made, and delivered with and as a part of said bonds so issued for the interest to accrue thereon and not otherwise.

53 That all of the matters and facts herein set forth are and always have been well known to and by the plaintiffs herein from a long time prior to the purchase of said bonds and coupons or any of them by the plaintiffs.

Wherefore defendant prays that plaintiffs take nothing by this action and that defendant may have judgment for its costs and disbursements herein.

Dated February 13th, 1881.

ROBERT TAYLOR AND A. J. EDGERTON,
Attorneys for Defendant, Kasson, Minn.

CHARLES M. START,
Of Counsel for Defendant, Rochester, Minn.

(Verification.)

Attached to the answer are copies of Exhibits "A," "B," and "C," appended to the complaint in this action.

The copy of the reply in said exemplification of record is in the following words and figures:

Circuit Court of the United States, District of Minnesota.

SAMUEL MARSHALL and CHARLES. F. ILSLEY, Plaintiffs,
vs.
THE TOWN OF PLAINVIEW, Defendant.

The said plaintiffs, in reply to the new matter contained in the answer of said defendant, deny each and every allegation thereof, except as hereinafter admitted, and aver that they purchased the bonds and coupons in question on the 8th day of July, A. D. 1879, for a valuable consideration and without any notice in fact of any of the matters relied on in defense of said action, except such as appears on the face of said bonds from the recitals therein contained, copies whereof in substance are annexed to said complaint; that said bonds or coupons are a part of the series of one hundred bonds numbered from one to one hundred, inclusive, of five hundred dollars each, issued to the Plainview Railroad Company, and in pursuance of the authority and proceedings mentioned in said answer.

54 And these plaintiffs, further replying, admit and aver that, about three months after they so purchased said bonds and coupons, they obtained information as to the alleged judicial proceedings in said answer mentioned as having been instituted by G. W. Harrington in the district court of the State of Minnesota for the county of Wabasha against the parties therein named, but deny that these plaintiffs were in any way whatever parties thereto, and, upon information and belief acquired as aforesaid, they admit that said action was tried upon the merits thereof and judgment entered therein March 15th, 1879, dissolving the injunction theretofore issued therein and dismissing said action, and that on the 18th day of March, 1879, pursuant to a resolution that day adopted by the supervisors of said town and of a previous resolution by them adopted, said bonds and coupons were regularly issued to the said Plainview Railroad Company under and pursuant to chapter 106 of the General Laws of Minnesota for 1877, and the proceedings under the same mentioned and referred to in said answer, as the said town had full power and lawful authority to do, pursuant to the laws of the State of Minnesota and the decision of the supreme court previously made in respect to the provisions of said statute, and that said bonds and coupons were regularly made and signed pursuant to the authority aforesaid by the then chairman of the board of supervisors of said town and its town clerk, as plaintiffs are informed and believe; that said bonds and coupons bear date on the first day of January, 1879, and that at the time the said plaintiffs purchased the same they understood and agreed that they were issued on that day and date and did not learn to the contrary until about three months

after they so purchased the same, and they admit that section seven of said act was, in form, repealed on the 6th day of March, 1879, but not until long after a mutual agreement under the provisions of said section seven between said Plainview Railroad Company and the said defendant for the issue and delivery of said bonds
55 had been arrived at, and not until a long time after the same had been fully performed by the said Plainview Railroad Company, as these plaintiffs are informed and believe.

And these plaintiffs, further replying on information and belief, allege that in the said action of said Harrington *vs.* The Plainview Railroad Company and others a motion on the part of said Harrington for a new trial therein was denied and an appeal taken from the order denying the same to the supreme court of the State of Minnesota on the 12th day of March, 1879, which appeal was afterwards heard in said supreme court, and was decided on the 6th day of October, 1880, and is the only appeal ever heard and determined in said action by said court, and its decision rendered therein is the only decision ever rendered in said supreme court in relation to said suit and the matters involved therein; that the said judgment dismissing said Harrington's complaint was in full force and effect and in nowise reversed, set aside, or vacated when these plaintiffs so purchased said bonds and coupons, but they admit that an appeal was afterwards taken therefrom to said supreme court on the 12th day of September, 1879, and that the same has never been heard or determined; and they admit that the supreme court of Minnesota, on the appeal so heard by it aforesaid and decided October 6th, 1880, did determine and decide, so far as it had the power to do so, that said section seven of said act was unconstitutional and void, which decision is reported in the Northwestern Reporter, in volume 6, page 777 to 781, inclusive, and to which decision plaintiffs refer for greater certainty as to the matters decided therein and thereby, and, upon information and belief, the plaintiffs admit that no election was ever called or held to authorize the defendant or its supervisors or officers to issue, make, or deliver said bonds or coupons or any of them.

That whether any of the persons mentioned signing the petition in said answer as tax-payers were not electors or legal voters in said town or whether any of them were women or minors or co-
56 partnership firms these plaintiffs have no knowledge or information sufficient to form a belief.

S. U. PINNEY,
Plaintiff's Attorney.

EASTERN DISTRICT OF WISCONSIN, *ss:*

Charles F. Ilsley, one of said plaintiffs, being duly sworn, says that he is one of the plaintiffs above named; that he has heard read the foregoing reply and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on his information and belief, and as to those matters he believes it to be true.

C. F. ILSLEY.

Subscribed and sworn to before me Dec. 1, 1881.
[SEAL.] EDWARD KRIETZ,
Clerk U. S. Circuit Court, Eastern Dist. of Wisconsin.

Indorsed: Filed Dec. 12, 1881. H. E. Mann, clerk.

The two stipulations of facts are in the following words and figures:

United States Circuit Court, District of Minnesota.

SAMUEL MARSHALL and ILSLEY
vs.
THE TOWN OF PLAINVIEW.

SAME PLAINTIFFS *vs.* TOWN OF ELGIN.

It is hereby stipulated and agreed between the attorneys of the respective parties to these actions as follows, to wit: That all the coupons described in the complaint in these actions are attached to or were taken from bonds of the same issue and date of like tenor as those, copies of which the annexed to the said complaint, respectively, and were purchased by the said plaintiffs with the said bonds before being detached therefrom.

2d. The printed paper book in the case of George W. Harrington against The Plainview Railroad Company *et al.* in the supreme court of Minnesota shall be put in evidence in these actions on the trial thereof as a true copy of the record in that case. The plaintiff therein (Harrington) appealed to the State supreme court from the order of the district court denying a new trial and perfected his said appeal March 12th, 1879. On March 15th, 1879, judgment was entered in and by the district court dissolving the injunction and dismissing the action, and on March 16th, 1879, the bonds in question of the town of Plainview were issued.

The decision of the State supreme court upon said appeal was made October 6th, 1880, and is reported in volume 6, Northwestern Reporter, pages 777 to 781, inclusive.

An appeal was also taken by said Harrington to said supreme court from said judgment September 12th, 1879, but it has never been brought to trial in the supreme court, and the said decis-
57 ion so reported as aforesaid is the only decision of said supreme court in that case.

The plaintiffs in these actions were not parties in any manner to said action of Harrington *vs.* The Plainview Railroad Company *et al.* True copies of the propositions, notice, petition (except signatures), and resolutions in the proceedings in each of said towns are attached to the respective answers in these actions.

III.

That the plaintiffs purchased the bonds and coupons in question July 9th, 1879, for value and without notice in fact of any of the

matters relied on in defence except such as appear upon the face of said bonds.

IV.

The only matters relied on in defence are—

First. That the provisions of chapter 106, and particularly of section 7 of chapter 106 of the General Laws of the year 1877 of the State of Minnesota under which the bonds and coupons in question were issued were and are unconstitutional and void.

Second. That the decision of the supreme court of the State of Minnesota in the case of Harrington *vs.* The Plainview Railroad Company *et al.* is conclusive and binding in respect to said first point upon the United States courts as an exposition and construction of the constitution of the State of Minnesota.

Dated June 20th, 1881.

ROBERT TAYLOR,
Attorney for each of said Defendants.
S. U. PINNEY,
Attorney for Plaintiffs.

Filed June 21st, 1881.

"United States Circuit Court, District of Minnesota.

SAMUEL MARSHALL and CHARLES F. ILSLEY
vs.
THE TOWN OF PLAINVIEW.

SAME PLAINTIFFS *vs.* THE TOWN OF ELGIN.

It is agreed in these cases that all the bonds in question from which all coupons in question were detached were registered pur-
58 suant to section 143 of chapter 11 of the General Statutes of Minnesota (Young's revision of 1878).

That the State auditor, pursuant to section 145 of chapter 11, did each year, after the issue of the bonds in question, certify to the county auditor of the county of Wabasha, in which the defendant towns were situated, the amount of tax required to meet the annual interest accruing on said bonds; that thereupon a tax was levied and extended by said county auditor upon the taxable property in said towns to meet such interest accruing on said bonds for each of the two first years, and such taxes were collected and paid to the county treasurer of said county in the usual manner of collecting taxes and as provided by said section 145; that with such taxes so levied and collected the one year's coupons first becoming due were paid and cancelled by said county treasurer pursuant to section 147 of said chapter 11, and that the second year's coupons, of which those in suit are part, have not yet been paid.

Dated June 30th, 1881.

ROBERT TAYLOR AND G. E. COLE,
Attorneys for Defendant.
S. U. PINNEY, *Plaintiffs' Attorney.*"

Endorsed: Filed June 30, 1881. H. E. Mann, clerk.

The opinion of the court is in the following words and figures:

"United States Circuit Court, District of Minnesota.

SAMUEL MARSHALL *et al. vs.* THE TOWN OF PLAINVIEW

SAME *vs.* THE TOWN OF ELGIN.

These actions were brought to recover the amount of coupons which were attached to bonds issued by the towns of Elgin and Plainview, in this district, the plaintiffs being owners of the bonds and coupons, and also to recover the amount of coupons owned by them taken from bonds held by other parties to whom the plaintiffs had sold them. The bonds and coupons were issued to the Plainview Railroad Company by the town of Plainview March 16th, 1879, and by the town of Elgin about January 1st, 1879, under chapter
59 106, General Laws of Minnesota 1877, and were purchased by the plaintiffs July 9th, 1879, for value and without notice of any of the matters relied on as defences except such as appear on their face.

Section 3 of the act referred to provides that no bonds shall be issued until a mutual agreement in relation to the construction of a railroad shall have been arrived at. Section 4 enacts that a railroad company desiring aid in the construction of its road shall make a proposition in writing, which shall contain a statement of the amount of the bonds of the town desired and when they are to be delivered, which shall be filed with the auditor or clerk.

Section 7 declares that one mode of arriving at the mutual agreement required shall be—

'First. That within three months after filing a proposition the railroad company shall cause notice to be given that after a day named a petition to the proper authorities asking them to agree to such proposition will be presented to the resident tax-payers; and to the petition shall be appended a copy of the proposition. Second. If within four months after the filing of such proposition with such clerk * * * the railroad company shall deliver to such clerk a substantial copy or copies of such proposition so filed with such petition to the proper authorities of such town, asking such authorities to agree to such proposition appended thereto, bearing the signatures of a majority of the persons residing in such * * * town, * * * who were assessed for taxes upon real or personal estate in such * * * town, * * * as shown by the last assessment-roll of the district of which aid is desired, which signatures shall be verified by the affidavit of some person witnessing such signatures, then such mutual agreement for the issue of bonds by such municipality and of the stock of such railroad company shall be deemed and considered to have been arrived at and perfected, and thereupon such bonds shall be issued and delivered in conformity with the true intent and meaning of such proposition and with the provisions of this act.'

Each bond contains the following recital:

60 'This bond is issued in pursuance of a mutual agreement between said town and said railroad company, which agree-

ment was made in accordance with the laws of the State of Minnesota and through and by a proposition made by said railroad company and duly accepted by said town upon petition therefor, signed by a majority of the resident tax-payers of said town, said agreement having been fully performed by the said railroad company on its part.'

'This bond is issued in pursuance of the authority given for that purpose by the laws of the State of Minnesota and in compliance with a resolution of the board of supervisors of said town.'

In the case of the town of Plainview, at or about the time the railroad had complied on its part with the mutual agreement, one George Harrington, a tax-payer of that town, brought an action in the district court of the State against the town officers and the Plainview Railroad Company to restrain the town officers from executing and delivering the bonds as stipulated, for the alleged reason that the act under which they issued (section 7, chapter 106, Laws of Minnesota for 1877), which provides for arriving at a mutual agreement between the railroad company and the town by proposition and petition of a majority of the resident tax-payers was unconstitutional and void. A temporary injunction was issued to restrain the execution and delivery of the bonds. The cause was tried January 27th, 1879, upon the stipulated facts, and among other things it was admitted at the trial—

'That, relying on and induced and influenced by the proceedings set out, and particularly by the resolution of the board of supervisors, the Plainview Railroad Company constructed and had before the commencement of that action its line of road constructed, and has had the same graded and the ties and iron laid thereon, with the cars running thereon from a point of junction with the Winona & St. Peter railroad, in the county of Olmsted, east of the
61 west line of Eyota, in said county, to a point within the corporate limits of the village of Plainview, as the same existed December 31, 1877, and had in all respects complied with the terms and conditions specified in the proposition by it to be performed.'

The district court held the act valid and found for the defendants. A motion for a new trial made by the plaintiff was denied March 11th, 1879, and he appealed from such denial to the supreme court of Minnesota on the next day. Three days afterwards judgment was entered by the district court dissolving the injunction and dismissing the action, and on the next day the town issued the bonds in question. On the 6th day of October, 1880, the supreme court of Minnesota, having heard the appeal, decided that the act under which the bonds were issued (chapter 106, section 7, Laws 1877) was unconstitutional and void.

S. U. PINNEY AND THOMAS WILSON,
For Plaintiffs.

GORDON E. COLE AND ROBERT TAYLOR,
For Defendants.

NELSON, *D. J.*:

These cases are tried together without a jury. The only matters relied on in the defence are—

First. That the provisions of chapter 106, General Laws of Minnesota 1877, and particularly of section 7, under which the bonds and coupons issued, were unconstitutional and void.

Second. That the decision of the supreme court of Minnesota in the case of Harrington *vs.* The Plainview Railroad Company is conclusive and binding in respect to the first point upon the Federal courts as an exposition and construction of the constitution of the State of Minnesota.

The view taken by the court will render it necessary to consider only the second defence urged. The following proposition must control the decision:

First. The recitals in the bonds are conclusive evidence
62 in favor of the plaintiffs, who purchased without other information than that which appears upon their face, that all the conditions precedent prescribed in the law had been complied with.

Second. If the law under which the bonds issued had been sustained and recognized as valid by the highest court of the State at the time, no subsequent act of the judiciary can impair their validity in the hands of the plaintiffs. The bonds on their face refer to the law under which power to issue them was given by the Legislature, and the coupons, though detached, are described with sufficient certainty in the complaint, and the evidence is plain that they belong to the bonds issued. If the bonds are valid obligations the coupons are identified and follow the bonds, so that if the second proposition can be applied the plaintiffs are entitled to recover.

In State *ex rel. vs.* Town of Highland, 25 Minn., 355, a case arose under the act of 1877, and section 7 was before the supreme court of the State. Proceedings for a mandamus to compel the Town of Highland to comply with the mutual agreement entered into as prescribed by this section were instituted, and on motion to quash the alternative writ, which had issued, the respondent's counsel presented and urged, in a written brief, among other things, the following, as appears by the records on file, but not given in their report of the case, viz:

'Fourth. Because the act of 1877, c. 106, in so far as it attempts to empower a majority of the tax-payers of a town, by means of a petition, to enter into and bind the town by agreement, is unconstitutional and void.'

The court in its decision, after citing the principal provisions of the act, say:

'We think the following propositions clearly deducible: First, the statute authorizes a town to aid the construction of railroads. It does not authorize aid to roads already constructed. The idea of the law-maker unquestionably was to authorize aid to
63 be given to roads which were believed to require aid to secure their construction and not to roads which had been constructed without such aid.

Second. The aid is to be rendered by the making of a mutual agreement between the town and the railroad company, by which the town is legally bound to issue its bonds to or for the use of the company upon performance by the latter of its part of the agreement and by the issue of bonds accordingly.

Third. Until the mutual agreement is arrived at and perfected, as provided in section 7, no legal liability or obligation whatever is imposed upon or incurred by the town in the premises. In other words, unless an agreement is arrived at and perfected as there provided all steps which may have been taken with the intent of arriving at and perfecting one or looking in that direction are absolute nullities.'

Here was a recognition, in my opinion, of the validity of this law and a full and comprehensive construction of the section. It is true the court did not consider the constitutional question, but the decision did not express a doubt, and at least favored its validity. This decision was rendered January 10th, 1879, and at that time the bonds, with the coupons, in suit of the town of Elgin had been issued and were in the market as commercial securities. The Plainview Railroad Company had also entered into an agreement with the town of Plainview and by the construction of its road was entitled to receive town bonds, when a suit was commenced in the district court of the State by a tax-payer and citizen of the town, entitled Harrington *vs.* The Town of Plainview *et al.*, to enjoin and restrain their issue, and a preliminary injunction issued. This suit was subsequently tried, and the action was dismissed by the court and the injunction dissolved, and the town issued its bonds. An appeal to the supreme court of the State was taken by Harrington, and, among other things, it was argued on the hearing that section 7 of the act was unconstitutional, and it was so declared by the
64 court. It is insisted that this decision of the highest court of the State is binding and the defendants entitled to judgment. Such is not my opinion. The Federal courts, it is true, generally follow the adjudications of the highest courts of the State in the construction of its statutes, but exceptions are recognized, and these cases fall within the rule laid down in The City *vs.* Lamson, 9 Wall., 477, which is, briefly, where a decision of the highest judicial tribunal at the time the bonds issued favors the validity of the law under which they were issued a subsequent decision impairing their validity will not be followed to the prejudice of *bona fide* holders.

To the same effect, Douglas *vs.* Pike Co., 101 U. S., 687:

'We have no hesitation in saying that the rights of the parties are to be determined according to the law as it was judicially construed to be when the bonds in question were put on the market as commercial paper.'

See collated authorities in Dillon on Municipal Corporations.

The question, as stated by the court in that case, is not so much whether the last decision was right as whether it should be followed. These bonds, having been purchased by the plaintiffs before the decision of the Harrington case, and — no previous expression by the court other than that contained in State *vs.* Town — Highland, are

'clear obligations to pay,' not affected by the last decision. It is urged that the bonds are invalid in the plaintiffs' hands by the fact that they were purchased during the pendency of the suit in which the law was held to be unconstitutional. The answer to this proposition is that the plaintiffs were not parties to and had no knowledge of that suit, and the rule that all persons are bound to take notice of a pending suit does not apply to negotiable securities. (97 U. S., 96.)

The plaintiffs are entitled to judgement in each case, and it's so ordered.

McCRARY, *C. J.:*

I concur in the conclusions reached in the foregoing opinion, as well as in the reasons by which they are supported.

65 (Endorsed:) Filed September 27th, 1881. H. E. Mann, clerk."

The order for judgment is in the following words and figures:

"*Term Minutes.*

United States Circuit Court, District of Minnesota. June Term, A. D. 1881. September 27, 1881.

SAMUEL MARSHALL *et al. vs.* THE TOWN OF PLAINVIEW.

Present: Hon. George W. McCrary, Rensselaer R. Nelson, judges

The court having filed its written opinion herein, it is ordered that judgment in favor of the plaintiffs and against the defendants be entered pursuant thereto."

The decision and judgment are in the following words and figures:

"*Term Minutes.*

United States Circuit Court for the District of Minnesota. June Term, A. D. 1881. October 11th, 1881.

SAMUEL MARSHALL and CHARLES F. ILSLEY
vs.
THE TOWN OF PLAINVIEW.

Present: Hon. Rensselaer R. Nelson, judge.

The issues joined in this action came on to be tried before the court without a jury, before the Hon. George W. McCrary, circuit judge, and the Hon. R. R. Nelson, district judge, holding the court. A trial of said issues by jury having been duly waived by a stipulation in writing, on file herein, and the court, having heard the evidence and the arguments, finds as facts:

First. That the bonds and coupons mentioned in the complaint were duly issued by the defendant on the 16th day of March, A. D.

1879, to the Plainview Railroad Company under and pursuant to chapter one hundred and six of the General Laws of Minnesota for 1877, and were purchased by the plaintiffs July 9th, 1879, for value and without notice of any of the matters relied on as defences, except such as appear on the face of such bonds, copies whereof are annexed to the complaint, and that the plaintiffs still own the same,
and that the amount due on said bonds and coupons and
66 sued for in this action is the sum of one thousand six hundred and ninety-seven dollars and sixty-six cents.

Second. The said bonds and coupons were issued in pursuance of a mutual agreement between said defendant and the said Plainview Railroad Company, arrived at pursuant to the provisions of section seven of said chapter one hundred and six, by which said town was to aid in the construction of the railroad of said company by an issue of its bonds in the sum of fifty thousand dollars, in consideration of which said company undertook and agreed to construct its railroad from the Winona and St. Peter railroad to a point within the village of Plainview, which was fully complied with on the first day of November, A. D. 1878, by said railroad company, and were so issued pursuant to a resolution of the board of town supervisors of said town passed March 18th, A. D. 1879.

Third. At or about the time said agreement was so complied with one George Harrington, a tax-payer of the defendant town, brought an action in the district court of Minnesota for Wabasha county against the supervisors and town clerk of said town of Plainview and the Plainview Railroad Company to restrain the town officers from issuing and the railroad company from receiving said bonds as stipulated, alleging that act under which they were issued (section 7, chapter 106, General Laws of Minnesota 1877) was unconstitutional and void, and a temporary injunction was issued to restrain the execution and delivery of the bonds. A trial of the action upon stipulated facts was had January 27th, 1879, and among other things it was admitted that, relying on and induced and influenced by the proceedings set out, and particularly by the resolution of the said town board of supervisors, the Plainview Railroad Company constructed and had before the commencement of that action its line of railroad constructed, and has had the same graded and the ties and the iron laid thereon, with the cars running thereon, from a point of junction with the Winona and St. Peter
railroad in the county of Olmsted east of the west line of Eyota
67 in said county, to a point within the corporate limits of the
village of Plainview as the same existed December 31, 1877, and had in all respects complied with the terms and conditions specified in the proposition by it to be performed. The district court held the act valid and found for the defendants. A motion for a new trial, made by the plaintiff, was denied March 11th, 1879, and from such denial he appealed on the next day to the supreme court of Minnesota. Three days afterwards judgment was rendered for the defendants, dissolving the injunction and dismissing the action, and, the injunction not having been continued or restored, the bonds were issued on the 16th day of March, 1879.

On the 6th day of October, 1880, after the plaintiffs had so purchased said bonds and coupons, the supreme court of Minnesota, having heard this appeal, decided that section 7 of said chapter 106, under which said bonds and coupons were issued, was unconstitutional and void.

About two months after the plaintiffs purchased said bonds and coupons the plaintiff in said action appealed from the final judgment therein, but such appeal has not been heard or determined. The plaintiffs in this action were not in any manner parties to said action of Harrington *vs.* The Plainview Railroad Company *et al.* of Fourth. Before the plaintiffs purchased said bonds and coupons the case of the State *ex rel. vs.* Highland, 25 Minn., 355, under section seven of said chapter 106, had been determined by the supreme court of Minnesota, and in that case it was insisted by the respondent's counsel that the alternative writ of mandamus should be quashed, 'Because the act of 1877, chapter 106, in so far as it attempts to empower a majority of the tax-payers of a town by means of a petition to enter into and bind the town by agreement, is unconstitutional and void.'

Fifth. All the bonds in question, and from which all coupons in question were detached, were registered pursuant to section 143 of chapter 11 of the General Statutes of Minnesota (Young's revision of 1878). The State auditor, pursuant to section 145 of said
68 chapter 11, did each year after the issue of the bonds in question certify to the county auditor of the county of Wabasha, in which the defendant town is situated, the amount of tax required to meet the annual interest accruing upon said bonds; thereupon a tax was levied and extended by said county auditor upon the taxable property in said town to meet such interest accruing on said bonds for each of the first two years, and such taxes were collected by and paid to the county treasurer of said county in the usual manner of collecting taxes and as provided by said section 145. With such taxes so levied and collected the one year's coupons first becoming due were paid and canceled by said county treasurer pursuant to section 147 of said chapter 11, and the second year's coupons, of which those in suit are part, have not been paid. True copies of the proposition, notice, petition (except signatures), and resolutions in the proceedings of the town of Plainview to issue said bonds are attached to the defendant's answer.

Sixth. The only objections made to the plaintiffs' recovery are—

First. That the provisions of chapter 106, General Laws of Minnesota of 1877, and particularly of section 7, under which the bonds and coupons issued, are unconstitutional and void.

Second. That the decision of the supreme court of the State of Minnesota in the case of Harrington *vs.* The Plainview Railroad Company *et al.* is conclusive and binding in respect to the first point upon the Federal courts as an exposition and construction of the constitution of the State of Minnesota.

And the court now being sufficiently advised of and concerning its opinion herein, now, on motion of S. U. Pinney, attorney for the plaintiffs, it is considered and adjudged that the said plaintiffs,

Samuel Marshall and Chas. F. Ilsley, do have and recover against the said defendant, The Town of Plainview, the said sum of one thousand six hundred and ninety-seven dollars and sixty-six cents, their damages aforesaid, together with the sum of forty-
69 nine dollars and thirty-two cents for their costs and disbursements in this action, amounting in the whole to the sum of one thousand seven hundred forty-six dollars and ninety-eight cents, and that they have execution therefor according to law.

Judgment record signed this 11th day of October, 1881. D. 697, 66; c. 49, 32, $1,746.98.

H. E. MANN, *Clerk.*"

(Endorsed:) Let the within finding and judgment be filed and entered. By the court: R. R. Nelson, judge. Filed October 11th, 1881. H. E. Mann, clerk."

To the admission of said Exhibit "G" and of each and every part thereof the defendant's counsel objected as incompetent, irrelevant, and immaterial. The court overruled the objection and received the evidence; to which ruling the defendant's counsel duly excepted.

The plaintiff's counsel thereupon offered in evidence certified copy of a record in the circuit court of the United States for the district of Minnesota on 71 of the coupons in question, wherein Samuel Marshall and Charles F. Ilsley were plaintiffs and this plaintiff, The Town of Plainview, defendant, marked Exhibit "H," which contained the complaint in the following words and figures:

70 Circuit Court of the United States for the District of Minnesota.

SAMUEL MARSHALL and CHARLES F. ILSLEY, Plaintiffs,
vs.
THE TOWN OF PLAINVIEW, in the County of Wabasha and State of Minnesota, Defendant.

The complaint of the above-named plaintiffs respectfully shows to the court that they reside at the city of Milwaukee, in the State of Wisconsin, and that they are citizens of said State, and that the above-named defendant, The Town of Plainview, is a body politic and corporate created and existing under and by virtue of the laws of Minnesota and is a citizen of said State of Minnesota, and for cause of action against said defendant the said plaintiffs allege—

1st. The said plaintiffs show that the said defendant, being thereto duly authorized by the laws of the State of Minnesota, on or about the first day of January, A. D. 1879, made and executed, for value received, its negotiable coupon or interest warrant, duly signed by the chairman of its town board of supervisors and by its town clerk, of which coupon or interest warrant the following is a copy, to wit:

$35. $35.

The Town of Plainview will pay to the holder hereof, on the first day of January, 1883, at the office of the treasurer of the State of Min-

nesota or at such other place in said State as is or may be designated by law, thirty-five dollars for one year's interest on bond No. 2.

T. G. BOLTON, *Chairman.*
A. B. W. NORTON, *Town Clerk.*

That said coupon or interest warrant was, on or about the first day of January, A. D. 1879, duly delivered with said bond, which the said defendant then duly issued, under and by virtue of the laws of the State of Minnesota, to the Plainview Railroad Company, a corporation created by and existing under the laws of the State of Minnesota, and the said plaintiffs are now the lawful holders of said coupon or interest warrant, and that the said defendant has not paid the said sum of thirty-five dollars therein specified at the office of the treasurer of the said State of Minnesota or at any other place designated by law, or elsewhere, although requested so to do,
71 but to pay the same or any part thereof the said defendant has hitherto wholly refused and doth still refuse; that there is now due and unpaid to said plaintiffs on the said coupon or interest warrant the said sum of thirty-five dollars, with interest thereon from the first day of January, A. D. 1883.

2nd. And for a further and seperate cause of action the said plaintiffs show that the said defendant, being thereto duly authorized by the laws of the State of Minnesota, on or about the first day of January, A. D. 1879, made and executed, for value received, its negotiable coupon or interest warrant, duly signed by the chairman of the town board of supervisors and by its town clerk, of which coupon or interest warrant the following is a copy, to wit:

$35. $35.

The Town of Plainview will pay to the holder hereof, on the first day of January, 1883, at the office of the treasurer of the State of Minnesota or at such other place in said State as is or may be designated by law, thirty-five dollars for one year's interest on bond No. 3.

T. G. BOULTON, *Chairman.*
A. B. W. NORTON, *Town Clerk.*

That said coupon or interest warrant was, on or about the first day of January, A. D. 1879, duly delivered with said bond, which the said defendant then duly issued, under and by virtue of the laws of the State of Minnesota, to the Plainview Railroad Company, a corporation created and existing under the laws of the State of Minnesota, and the said plaintiffs are now the lawful owners and holders of said coupon or interest warrant, and that the said defendant has not paid the said sum of thirty-five dollars therein specified, at the office of the treasurer of the State of Minnesota or at any other place designated by law or elsewhere, although requested so to do, but to pay the same or any part thereof the said defendant hath hitherto wholly refused and doth still refuse; that there is now due and unpaid to said plaintiffs on the said coupon or interest warrant the said sum of thirty-five dollars, with interest thereon from the 1st day of January, A. D. 1883.

(Here follow 69 other counts in the very language of the second count above quoted, except as to the number of the bond to which the coupon was attached.)

72 Wherefore the plaintiff demands judgment against the said defendant for the aggregate of said coupons or interest warrants, amounting in all to two thousand four hundred and eighty-five dollars, with interest thereon, at the rate of seven per cent. per annum, from the first day of January, A. D. 1883, together with the costs and disbursements of this action.

S. U. PINNEY,
Plaintiffs' Attorney.

Messrs. Rogers & Rogers, agents at St. Paul, Minn.

The above-named defendant and its attorneys will take notice that the foregoing complaint in this action is founded on seventy-one coupons or interest warrants, copies of which are contained in the statement of the causes of action set forth in said complaint, numbered from one to seventy-one, inclusive, and that upon the trial coupons or interest warrants, of which copies are set forth in words and figures at length in the statements of said cause of action, will be given in evidence in support of said complaint.

Yours, &c., S. U. PINNEY,
Plaintiffs' Attorney.

Endorsed: Filed May 11th, 1883. H. E. Mann, clerk, by O. J. Reynolds, deputy.

After the summons and proof of service thereof follows the report of the clerk, which is in the following words and figures:

"Circuit Court of the United States of America for the District of Minnesota. — Term, 186–.

SAMUEL MARSHAL *et al.*
vs.
TOWN OF PLAINVIEW. } No. —.

I, H. E. Mann, clerk of the circuit court of the United States of America for the district of Minnesota, do hereby report that, in pursuance of an order of this court referring to me to ascertain and report the amount due the plaintiff, I have assessed the damages to the plaintiff at the sum of two thousand five hundred and sixty dollars and thirty-seven cents—damages, $2,560.37.

Dated June 27th, 1883.

H. E. MANN, *Clerk.*

73 The judgment in Exhibit "H" is in the following words and figures:

Judgment.

United States Circuit Court, District of Minnesota.

SAMUEL MARSHALL and CHARLES F. ILSLEY
vs.
THE TOWN OF PLAINVIEW, in the County of Wabasha and State of Minnesota.

The summons in this action having been returned by the marshal—personally served on the defendant, The Town of Plainview, in the county of Wabasha and State of Minnesota, by handing to and leaving with J. F. Pope, chairman of the board of supervisors of said town, a true copy thereof, at Plainview, in said district, on the 14th day of May, 1883, and the said defendant having failed to answer the plaintiffs' complaint, as in and by said summons it was required, and the time for answering having expired:

Now, on motion of plaintiffs' attorney, it is considered, ordered, and adjudged that the plaintiffs do have and recover of and from the defendant the sum of two thousand five hundred and sixty dollars and thirty-seven cents, being the amount demanded in the complaint, together with their costs by them in and about their suit in this behalf expended, taxed at $35.20, and that the plaintiffs have execution therefor.

Judgment record signed this 7th day of June, A. D. 1883.

H. E. MANN, *Clerk.*

Damages	$2,560 37
Costs	35 20
Total	$2,595 57

To which Exhibit H and to each and every item and part thereof the defendant's counsel objected on the ground that it was incompetent, irrelevant, and immaterial. The court overruled the objection and received the evidence; to which ruling the defendant's counsel duly excepted.

The plaintiff thereupon offered in evidence certified copy of judgment-roll, marked Exhibit J, in a suit in said last-mentioned court between said last-mentioned parties to recover on 20 of said coupons, which is identical with Exhibit H aforesaid, except as to the number of the bonds to which said coupons were attached and as to the number of coupons and the dates at which they grew due. The judgment (by default) in Exhibit J — rendered October 25th, 1883, for damages, $740.00, and for costs, $31.15.

74 To which Exhibit J and to each and every part thereof the defendant's counsel objected as incompetent, irrelevant, and immaterial. The court overruled the objection and received the evidence; to which ruling the defendant's counsel duly excepted.

The plaintiff's counsel then offered in evidence a certified copy of judgment-roll in a suit in said last-mentioned court between the said

last-mentioned parties on 109 of said coupons, which was marked Exhibit K. It is the same as Exhibit H aforesaid, except as to the number of coupons and the date of their maturity and the number of the bonds to which they were attached. The judgment in said Exhibit K was rendered February 4th, 1884, for $3,862.27 damages and $53.95 costs.

To which Exhibit K the defendant's counsel objected as incompetent, irrelevant, and immaterial. The court overruled the objection and received the evidence, and defendant's counsel duly excepted to such ruling.

Plaintiff thereupon offered in evidence a certified copy of another judgment-roll in a suit in said last-mentioned court on some of said coupons between the same parties, which is marked Exhibit L, and which is in all respects the same as Exhibit H aforesaid, except as to the number of coupons, the date of their maturity, and the number of the bonds to which they are attached.

The defendant's counsel objected to the said Exhibit L and to each and every item and part thereof as incompetent, irrelevant, and immaterial. The court overruled the objection and received the evidence; to which ruling the defendant's counsel duly excepted.

The judgment rendered in Exhibit L was for damages, $3,520.41, and costs, $51.05, and is dated the 31st day of January, 1885.

The plaintiff thereupon offered in evidence Exhibit I, being a certified copy of a judgment-roll in a suit in said last-mentioned court between the said last-mentioned parties on 45 of said coupons. The complaint in said action is the same as that in Exhibit H aforesaid, except as to the number of coupons, the dates at which they grew due, and the number of the bonds to which they were attached.

The defendant answered in the following words and figures:

United States Circuit Court, District of Minnesota.

SAMUEL MARSHALL and CHARLES F. ILSLEY, Plaintiffs,
vs.
THE TOWN OF PLAINVIEW, Defendant.

75 The said defendant, for answer to the complaint herein and to each and every separate count and cause of action therein, denies each and every allegation thereof except only such as are hereinafter admitted.

It admits that it is, and during all the time in the complaint mentioned has been, a body politic and municipal corporation of and within the State of Minnesota, and that plaintiffs are residents and citizens of the State of Wisconsin.

Defendant admits and alleges that each and all of the pretended coupons and obligations set out and declared upon in the complaint were made and signed by the then chairman of the board of supervisors of defendant and its town clerk and delivered to the Plainview Railroad Company (a corporation organized under and by virtue of

the laws of the State of Minnesota) attached to, in connection with, and as part of the pretended bonds hereinafter recited and described and in the manner and under the authority and circumstances hereinafter stated, and not otherwise; and defendant admits and alleges that the plaintiffs are the owners and holders of all said pretended coupons and also a large number of said pretended *coupons* so made and delivered with and as a part of said coupons, which bonds and coupons so owned and held by plaintiffs amount in the aggregate to more than ten thousand dollars upon their face and were and are part of parcel of one and the same issue and series of bonds and coupons were all made delivered at one and the same time, for the purpose, and in the manner and under the authority and circumstances hereinafter set out, and not otherwise; and this defendant expressly denies that it executed or delivered any of said bonds coupons, and denies that either it or the said chairman of its board of supervisors or its said town clerk were ever lawfully authorized or empowered to execute or deliver said bonds or coupons or of them, and denies that any of them were executed or delivered other or pursuant to any lawful authority or in any manner save as hereinafter fully stated.

Further answering, defendant alleges that each and all of said bonds and coupons, including all those declared upon in the complaint, were made and delivered by said chairman of the board of supervisors and said town clerk of defendant under and pursuant to and pretended authority and provisions of section seven (7) of chapter one hundred and six (106) of the General Laws of the State of Minnesota for the year 1877, being an act of the Legislature for the State of Minnesota, approved March 5th, A. D. 1877, entitled "An act to authorize municipal corporations to aid in the construction of railroads," and by virtue of certain proceedings thereunder had as hereinafter stated, and not otherwise; that on or about the 22d day of January, 1878, said Plainview Railroad Company made and delivered to the town clerk of defendant a proposition in writing, a true copy of which is hereto attached, marked Exhibit A, and is hereby referred to as part of this answer, which proposition was filed in the office of said town clerk and transcribed into the records of said town; that on the 21st day of January, A. D. 1878, said railroad company caused the notice to be given, posted, and published as prescribed by section seven (7) of said act, a copy of which notice is hereto attached, marked Exhibit B, and is hereby referred to as part of this answer.

That on the 30th day of March, A. D. 1878, said railroad company delivered to said town clerk substantial copies of said proposition, and appended thereto a petition, in matter and form as provided by said section seven (7) of said act, asking the proper authorities of defendant to agree to said proposition, bearing the signatures of a majority of the persons then residing in said town of Plainview who were assessed for taxes upon real or personal property in said town, as shown by the last assessment-roll thereof, which signatures were verified by the affidavit of persons witnessing the same, a copy of which petition (omitting only the signatures and the verifications

thereof) is hereunto attached, marked Exhibit "C," and is hereby referred to as part of this answer; that a large number of such petitioning tax-payers were neither electors nor legal voters of said town nor at all; that the said section seven of the aforesaid act and th aforesaid proceedings thereunder constituted and were and ar the only basis, power, or authority ever conferred upon or obtaine by defendant or the chairman of the board of supervisors or i town clerk to issue, make, and deliver said bonds or coupons or a of them or any bonds or coupons whatever, and that no electi was ever called or held or other proceedings of any kind ever h or attempted to authorize this defendant or its supervisors or any its officers to issue, make, or deliver said bonds or coupons or a of them or any bonds or coupons whatever except as hereina fully recited.

Defendant further alleges that after all the proceedings aforesa and before the making and delivering of any of said bonds or c pons an action was duly begun, instituted in the district cou the State of Minnesota in and for said county of Wabas
77 in said State, being the proper court of original jurisdicti therein, in which action one George W. Harrington (a r dent citizen and tax-payer of said town) was plaintiff and this fendant and its several supervisors and their chairman and its t clerk and said The Plainview Railroad Company were defenda the object and purpose of which action was to have said officers a defendant enjoined perpetually from issuing and said railroad co pany from receiving or obtaining any of said bonds or coupons, the ground that said section seven of said act under and pursua to which alone all said proceedings were so had and done was and is unconstitutional and void and said proceedings thereunder wholly invalid.

That in said action summons was duly served upon each and all of the defendants therein, who all duly appeared and answered therein, and said State court duly obtained and had full and complete jurisdiction therein, both of the subject-matter of said action and of all the parties thereto; that said action was duly tried upon its merits and determined and judgment duly entered therein, from which an appeal was duly taken and perfected to the supreme court of said State, being the court of last resort therein, and was duly tried and determined by said supreme court, in and by which it was, on the 6th day of October, 1880, duly determined, decided, and adjudged that said section seven (7) of said act was and is unconstitutional and void, and that all said proceedings — invalid, and that neither this defendant nor said officers of defendant have or had any power or authority to issue any of said bonds or coupons, which judgment and decision remains in full force and effect.

Defendant further alleges that on the 6th day of March, A. D. 1879, said section seven of the aforesaid — was duly repealed by the Legislature of the State of Minnesota in and by the provisions of chapter 72 of the General Laws of said State for the year 1879, to which reference is hereby made.

Defendant further alleges that afterwards and during the pen-

dency of said action in said State court, to wit, on the 19th day of March, 1879, the then chairman of the board of supervisors and the town clerk of defendant, without any authority or power so to do save only that hereinbefore set forth, did, in pursuance of said section seven of said act of March 5th, 1877, and of said unconstitutional and invalid acts and proceedings thereunder, and not otherwise, make and deliver to said railroad company one hundred bonds,
78 numbered from one to one hundred, respectively, with interest coupons attached thereto, including all the coupons set out in the complaint, each coupon containing a recital of the number of the bond attached, each and every one of which bonds, and coupons were then made to bear date on the first day of January, 1879, and were each and all of them of the same form, tenor, and substance, and contained upon the face of each of said bonds the same recitals, and among other things full recitals that they and each of them were so issued under and pursuant to the provisions and authority of said unconstitutional section of said act of March 5th, 1878, and said invalid proceedings thereunder; that each of said pretended bonds so issued was and is a pretended obligation of defendant to pay to said railroad company or bearer, twenty years after said date thereof, the sum of five hundred dollars; that a true copy of one of said pretended bonds is here*by* attached, marked Exhibit D, and is hereby referred to as a part of this answer, and that all the balance of said pretended bonds were and are of the same substance, tenor, and import; that in addition to the coupons in the complaint set out plaintiffs have become before the commencement of this action and still are the owners and holders of a large number, to wit, over twenty, of said pretended bonds so issued and delivered therewith, amounting in all to over ten thousand dollars; the liability of defendant upon each and all of which is to be and will be adjudicated and determined in and by this action.

Defendant further alleges, upon information and belief, that plaintiffs became the owners of the coupons in question long after said judgment and decision of said supreme court of said State of Minnesota, and that all the matters and facts hereinbefore set out were well known to plaintiffs before they so became owners and holders of said coupons or any of them.

Defendant further shows that in and by proceeding and action duly instituted and had in and by the district court of said State in and for Wabasha county, long before the commencement of this action, said court has duly enjoined the payment of any of said coupons and the levy of any tax for that purpose by the final judgment of said State courts duly made and entered and now in force.

Wherefore defendant prays that plaintiffs take nothing hereby and that defendant have judgment for its costs and disbusements.

GORDON E. COLE AND ROBERT TAYLOR,
Attorneys for Defendant.

79 Appended to the answer as exhibits are copies of the "proposition," "notice," and "petition," and of a bond and coupon set out at length in the pleadings in this suit.

To the answer the plaintiffs replied in the following words and figures:

Circuit Court of the United States for the District of Minnesota.

SAMUEL MARSHALL and CHARLES F. ILSLEY, Plaintiffs,
vs.
THE TOWN OF PLAINVIEW, Defendant.

The above-named plaintiffs, in reply to the answer of the said defendant, deny each and every allegation and statement of new matter therein contained, and aver that they purchased the bonds and coupons in question on the 9th day of July, A. D. 1879, for a valuable consideration by them then paid therefor and without notice or knowledge of any of the matters relied on in said answer in defense of said action, except such as appear on the face of said bonds, of one of which said Exhibit D annexed to said answer is substantially a copy.

S. U. PINNEY,
Plaintiffs' Attorney.

Endorsed: "Filed November 29th, 1881. H. E. Mann, clerk."

Circuit Court for the United States for the District of Minnesota.

SAMUEL MARSHALL and CHARLES F. ILSLEY, Plaintiffs,
vs.
THE TOWN OF PLAINVIEW, Defendant.

The said plaintiffs, in reply to the new matter contained in the answer of the defendant, deny each and every allegation thereof, except as hereinafter specifically admitted, and aver that they purchased the coupons in question, with the bonds to which the same were attached; on the 8th day of July, A. D. 1879, for a valuable consideration and without any notice in fact of any of the matters relied on in defence of said action, except such as appears on the face of said bonds from the recitals therein contained, and that Exhibit "D" annexed to said answer is a copy of one of said bonds, and that they were all alike, except as to the number, and were numbered from one to one hundred, inclusive. They admit that at the time of the commencement of this action they owned and still own seventeen of of the bonds of the series of five hundred dollars each, and no more,
but deny that they then owned or now own any or either of
80 the bonds from which the coupons mentioned in the complaint or any or either of them were taken.

The said plaintiffs, further replying, admit and aver that about three months after they so purchased said bonds and coupons they obtained information as to the alleged judicial proceedings in said answer mentioned as having been instituted by George W. Harring-

ton in the district court of the State of Minnesota for the county of Wabasha against the parties therein named, but deny that these plaintiffs were in any way whatever parties thereto or to any of the judicial proceedings referred to in said answer, and, upon information and belief acquired as aforesaid, they admit that said action was tried upon the merits thereof and judgment entered therein March 15th, 1879, dissolving the injunction theretofore issued therein and dismissing said action, and that on the 18th day of March, 1879, pursuant to a resolution that they adopted by the board of supervisors of said town and of a previous resolution by them adopted, said bonds and coupons were regularly issued to the said Plainview Railroad Company under and pursuant to chap. 106 of the General Laws of Minnesota for 1877 and the proceedings under the same mentioned and referred to in said answer, as the said town had full power and lawful authority to do, pursuant to the laws of the State of Minnesota and the decision of its supreme court previously made in respect to the provisions of said statutes, and said bonds and coupons were duly made and signed, pursuant to the authority aforesaid, by the then chairman of the board of supervisors of said town and its town clerk, as plaintiffs are informed and believe; that said bonds and coupons bear date of the first day of January, 1879, and that at the time the said plaintiffs purchased the same they understood and believed that they were in fact issued on that date, and did not learn to the contrary until about three months after they so purchased the same, and they admit that said section seven of said act was in form repealed on the 6th day of March, A. D. 1879, but not until long after a mutual agreement under the provisions of said section seven between said Plainview Railroad Company and the said defendant for the issue and delivery of said bonds had been arrived at under the provisions of said act and not until a long time after the same had been fully performed by said railroad company, as these plaintiffs are informed and believe.

And the plaintiffs, further replying on information and belief, allege that in the said action of said Harrington against The
81 Plainview Railroad Company and others a motion on the part of said Harrington for a new trial therein was denied and an appeal taken from the order denying the same to the supreme court of the State of Minnesota on the 12th day of March, 1879, which appeal was afterwards heard in said supreme court, and was decided on the 6th day of October, 1880, and it is the only appeal ever heard and determined by said court in said action, and its decision rendered therein is the only decision ever rendered by said supreme court in relation to said suit and the matters involved therein; that the said judgment dismissing the said Harrington's complaint was in full force and effect and in nowise reversed, set aside, or vacated when the plaintiffs so purchased these bonds and coupons, but they admit that an appeal was afterwards taken therefrom to said supreme court on the 12th day of September, 1879, but that the same has never been heard or determined, and they admit the supreme court of Minnesota, on the appeal so heard by it as aforesaid and decided on October 6th, 1880, did determine and de-

cide, so far as it had the power to do so, that said section seven of said act was unconstitutional and void, which decision is reported in the N. W. Rep., Vol. 6, pp. 777 to 781, inclusive, and to which decision plaintiffs refer for greater certainty as to the matters decided therein and thereby.

And these plaintiffs, further replying, admit that actions were instituted and had in the district court of said State for Wabasha county before the commencement of this action in which the county treasurer of said county was enjoined from paying any of said bonds or coupons and the county auditor enjoined from levying any tax for that purpose, but these plaintiffs deny that they were parties to said actions or either of them in any way whatever.

And, on information and belief, these plaintiffs admit that no election was ever called or held to authorize the defendant town or its supervisors or officers to issue, make, or deliver said bonds or coupons or any of them.

S. U. PINNEY,
Plaintiffs' Attorney.

Verified.

Endorsed: Filed Dec. 2nd, 1881. H. E. Mann, clerk.

Judgment was entered January 10th, 1883, for costs and damages in the sum of $1,683.31.

82 To said Exhibit "I" and to each and every part thereof defendant's counsel objected as incompetent, irrelevant, and immaterial. The court overruled the objection and received the evidence; to which ruling the defendant's counsel duly excepted.

The plaintiffs' counsel thereupon offered in evidence Exhibit "M," being certified copy of judgment-roll in said court in a suit between said parties on 109 of the said coupons, which judgment-roll is in all respects the same as Exhibit "I" aforesaid, except as to the number of coupons sued on, the date of their maturity, and the number of bonds to which they were attached.

Judgment was rendered in the last-mentioned suit January tenth, 1883, for $4,109.65.

To the admission of which defendant's counsel objected as incompetent, irrelevant, and immaterial. The court overruled the objection and received the evidence; to which ruling the defendant's counsel duly excepted.

The defendant's counsel refers to each and all of said Exhibits marked respectively "G," "H," "I," "J," "K," "L," and "M" as part of this case, and will refer to the same on any motion, argument, or subsequent proceedings in this suit as if they were literally annexed hereto as exhibits.

Plaintiffs' counsel thereupon offered in evidence chapter 414 of the Special Laws of Minnesota for the year A. D. 1881, set up and pleaded in the complaint, and which is here referred to as a part of this case; to which the defendant's counsel objected as incompetent, irrelevant, and immaterial. The court overruled the objection and

received the evidence, and defendant's counsel duly excepted to such ruling, which act is correctly set forth in the findings in this case.

Plaintiffs' counsel thereupon offered in evidence the deposition of C. T. Benedict, a copy of which is hereto annexed and marked Exhibit "T."

Plaintiffs' counsel thereupon offered in evidence the deposition of Charles F. Ilsley, a copy of which is hereto annexed and marked Exhibit "U."

Plaintiffs' counsel thereupon offered in evidence stipulation as to payment of certain judgments, a copy of which is hereto annexed and marked Exhibit "Z," and thereupon rested.

This was all the evidence offered by the plaintiffs.

83 *Defendant's Evidence.*

The defendant's counsel then called as a witness CHARLES J. STAUFF, who testified as follows:

"Q. You are clerk of this court?

A. Yes, sir.

Q. You have been for how many years?

A. About 14 years.

Q. As such clerk you have custody of all the records of this court?

A. Yes, sir.

Q. Were you present yesterday when the counsel for the plaintiffs in this case offered in evidence in this court the records and files in the case of Harrington against The Plainview Railroad Company and others?

A. Yes, sir.

Q. You were?

A. Yes, sir.

Q. Were all the records and files which existed in that case in your court then offered?

A. Yes, sir.

Q. Were there any other papers, records, or files in your office in that case save those which you handed to the opposite counsel and which were offered in evidence by them last evening?

A. None whatever.

Defendant's counsel thereupon called as a witness GEORGE W. HARRINGTON, who testified as follows:

Direct examination by Mr. WILSON:

Q. Mr. Harrington, what time in the year did they commence the building on the Plainview railroad?

A. I think it was some time in the fore part of the summer of 1858.

Q. Wasn't it early in the spring some time?

A. Some time after March.

Q. 1858 or 1878?

A. 1878.

84 Q. After March, you think?

A. Yes, sir.

Q. Did they not commence just as soon as the frost was out of the ground?

A. I could not tell you.

Q. What is your best recollection?

A. My best recollection is in the fore part of the summer.

Objected to as immaterial.

Mr. WILSON: I will tell the object. In January, 1878, a proposition was made to the people of this town—these two towns—by the Plainview Railroad Company that the company would build a road from a given point on the Winona and St. Peter railroad at Eyota to a given point in the village of Plainview (the road running through the village of Elgin and town of Elgin) within a given time and in a given manner if bonds should be voted. I wish to show that after that time the company took steps right along according to the law; that early in the spring it commenced building that road, and that within the time it was built and completed and the law was in all respects complied with, and that until the last dollar was spent there was nothing said or done by any resident of either town. Now, I want to show by this witness one thing, to wit, when they commenced to turn the soil.

Mr. DAVIS: You have shown that.

Mr. WILSON: That is all I want. I understand you they commenced very soon after the frost was out of the ground?

A. Some time early in the summer.

Q. According to your best recollection?

A. We had some struggle in the board of supervisors at the March meeting.

Q. And very soon after that they commenced to grade?

A. Yes, sir.

Q. And they kept along grading until they finished?

A. Yes, sir.

85 Mr. DAVIS: I object. I move to strike out that answer.

Mr. WILSON: I want to prove just what I have proven by this witness, that they commenced at that time and kept right along."

Defendant's counsel then offered in evidence the depositions of Albert Keep, George W. Van Dusen, and Terrill Thomas, copies of which are hereto annexed, marked, respectively, Exhibits "1," "2," and "3."

Thereupon defendant rested.

This was all the evidence offered or received in the case.

The case was thereupon submitted to the court (without a jury), who thereafter filed his findings and decision, a copy of which is hereto annexed, marked Exhibit "4."

The defendant's counsel thereafter moved the court to amend his

findings and to make the same more specific and definite and to find farther as follows, viz:

District Court, Wabasha County, State of Minnesota.

THE TOWN OF PLAINVIEW
ag'st
THE WINONA & ST. PETER RAILROAD COMPANY.

"SIRS: Please take notice that on the pleadings in this action and on the findings of the court herein the defendant will make a motion before the Honorable L. W. Collins, the judge who tried this case, at a special term of court to be held by him in the city of St. Cloud, in said State, on the 24th day of April, A. D. 1886, at 10 o'clock a. m. or as soon thereafter as counsel can be heard, that the said judge make his findings in this action more full and specific, and that he make and file additional findings herein as follows, viz: That he find particularly and fully whether the matters and facts alleged in that subdivision of the answer numbered ten or what, if any, of such matters or facts are true as therein alleged.

Second. Whether the matters and facts and what, if any,
86 of the matters or facts alleged or set out in subdivision eleven of the said answer are true as therein alleged.

Third. Whether George W. Van Dusen, as president of the Plainview Railroad Company, acting for and on behalf of said company, on or about the 10th day of May, 1878, entered into a contract with the Chicago and Northwestern Railway Company, a copy of which is attached to the deposition of Albert Keep, a witness examined in this action.

Fourth. Whether, in pursuance of the said contract and of the petition of the resident tax-payers of said town and of the action of the board of supervisors of said plaintiff town, as found by the court herein the Chicago and Northwestern Railway Company advanced any, and, if any, how much, money to aid in the building of the said line of road of the said Plainview Railroad Company, and if any such money was advanced when, and whether such money so advanced, if any, was used in the building of the said line of road of the said Plainview Railroad Company.

Fifth. And, if said Chicago and Northwestern Railway Company advanced such money for the purpose aforesaid, whether it did so relying on the bonds of the plaintiff town and on the security thereof and its right thereto; and whether it, the said Chicago and Northwestern Railway Company, was induced and influenced to advance such money to aid in building said road by the contract of said Van Dusen and by the action of the officers of said town and the petition of the resident tax-payers of said town aforesaid; and whether the officers of the said Chicago and Northwestern Railway Company, when it obtained said bonds, believed that it had a legal right thereto, and that the law under which they were issued was constitutional and valid.

Sixth. Whether, after the making of said contract by and be-

tween said Van Dusen and the Chicago and Northwestern Railway Company on the 10th day of May, 1878 (if such contract was made), the said George W. Van Dusen acted in all he did about the
87 building of the Plainview railroad and in and about the obtaining and forwarding of said bonds under the said contract made as aforesaid; and whether in obtaining said bonds and delivering them he intended to and believed it was his duty to obtain the same for and deliver the same to the said Chicago and Northwestern Railway Company; and whether he believed that the said Chicago and Northwestern Railway Company was entitled to the same under its contract aforesaid and on account of the advancement of money by it made as aforesaid; and whether at the time of obtaining and delivering said bonds the said Van Dusen believed that they had been legally earned, and that they were legally issued, and that the law under which they were issued was constitutional and valid, and that the Chicago and Northwestern Railway Company was entitled to them.

Seventh. Whether the line of road of the Plainview Railroad Company was in process of construction for a long time prior to the time when said bonds were issued; and whether it was during all said time well known by the officers of the plaintiff town and generally by the residents and tax-payers of the said town that said road was being built and money advanced to aid in the building thereof on the faith of the aid promised thereto by the plaintiff town and other towns along its line; and whether until after said road was fully completed any objection was made by any resident of the plaintiff town or by any one to the issuance of said bonds of plaintiff town.

THOMAS WILSON,
Defendant's Attorney.

To Hon. C. K. Davis and Kellogg and Eaton, plaintiff's attorneys."

Which motion, after hearing argument of counsel for the respective parties thereon, was submitted to the court and overruled and denied by the court as follows, and exception was taken to such refusal as follows by an order in the words and figures following:

88 *Order Denying Motion to Make Additional and More Specific Findings.*

STATE OF MINNESOTA, *Wabasha County:*

In District Court.

THE TOWN OF PLAINVIEW *ag'st* THE W. & ST. P. R. R. COMPANY.

"A motion having been made by the defendant in the above-entitled action that further and additional findings be made and filed therein, and said motion having been duly argued and submitted, it is now ordered—

That said motion as a whole and in detail is hereby denied.

Further and additional findings, as requested, are refused for several reasons, and among others that said matters are in part immaterial and in part have been passed upon in findings already made.

To which refusal to so make and file the counsel for the defendant then duly excepted, and to which refusal to find and state which of said requests were deemed immaterial and for that reason denied said counsel duly excepted.

By the court:

L. W. COLLINS, *Judge.*

Dated April 24th, 1886."

And thereupon the counsel for the respective parties stipulated as follows:

Stipulation.

"It is hereby stipulated that the proceedings as to allowing additional and more specific findings were had and the action of the court thereon was as above stated, and that the same may be incorporated into the case herein and considered on the motion for a new trial and on all subsequent proceedings herein without any farther or other act or without any affidavit or other proof or evidence of such proceedings.

KELLOGG & EATON AND C. K. DAVIS,
Plaintiff's Attorneys.
THOMAS WILSON, *Defendant's Attorney.*"

89 EXHIBIT "A."

Stipulation.

District Court, Wabasha County, State of Minnesota.

THE TOWN OF ELGIN
vs.
THE WINONA AND ST. PETER RAILROAD COMPANY.

THE TOWN OF PLAINVIEW
vs.
THE WINONA AND ST. PETER RAILROAD COMPANY.

It is hereby stipulated and admitted in each and both of the above-entitled actions that the Chicago and Northwestern Railway Company sold all of the bonds in question of the plaintiff towns above named to T. Thomas, of Baraboo, in the State of Wisconsin, for the price of eighty per cent. of their par or face value, he being the man named Thomas referred to in the deposition of Charles F. Ilsley in these suits.

Second. It is also further admitted and stipulated in each and both of the above-entitled actions that the terms and provisions of the statute under which said bonds were issued were in all respects conformed to and complied with by the Plainview Railroad Com-

pany, and that the "proposition" submitted under said statute was in all respects complied with, and that the said Plainview Railroad Company had prior to the issuance of said bonds earned and become entitled to the same if the law authorizing their issue was constitutional; but it is also admitted that there was no election or vote of the electors of said towns or of either of them authorizing the issue of said bonds or any vote by the electors upon the "proposition" therefor, but that the proceedings had were by and in pursuance of a petition of a majority of the tax-payers of said town as provided in said statute.

Third. It is further stipulated and admitted that no issue shall be raised as to the value of the property and franchises of the Plainview Railroad Company transferred to the defendant, but that
90 if the plaintiffs or either of them recover judgment against the defendant no question shall be made by the defendant, but that the property conveyed and deeded to defendant by the Plainview Railroad Company was and is in value equal to the judgment so obtained, it *is* being conceded for the purpose of this action that the value of the property was and is equal to amounts claimed in the complaint.

THOMAS WILSON, *Attorney for Defendant.*
C. K. DAVIS AND KELLOGG & EATON,
Plaintiff's Attorneys.

91 EXHIBIT "B."

Plainview Railroad Company to Winona & St. Peter Railroad Company.

This indenture, made this 11th day of May, A. D. 1881, by and between the Plainview Railroad Company, a corporation of the State of Minnesota, party of the first part, and the Winona & St. Peter Railroad Company, a corporation of said State, party of the second part, witnesseth:

The said party of the first part, for and in consideration of the sum of two hundred and twenty-five thousand dollars ($225,000.00) to it paid by said party of the second part, the receipt of which is hereby acknowledged, and by virtue of the power and authority conferred upon the parties hereto by an act of the Legislature of the said State, entitled "An act to authorize the Winona & St. Peter Railroad Company to purchase the stock and to purchase or lease the property and franchises of the Plainview Railroad Company," approved March 3d, 1881, and with the unanimous consent of the stockholders of both parties hereto, hath granted, bargained, sold, transferred, and conveyed, and by these presents doth grant, bargain, sell, transfer, and convey, to said party of the second part and to its successors forever all and singular the railroad of said party of the first part, beginning at a point within the corporate limits of the village of Plainview, in the county of Wabasha, in the State of Minnesota, to a junction with the railroad of the Winona & St. Peter Railroad Company in the county of Olmsted, in the State of

Minnesota, a distance of about sixteen miles, more or less, with all and singular the franchises, including the franchises to be a corporation, and all rails, switches, turnouts, warehouses, station buildings, elevators, water tanks, turn-tables, side tracks, tools, ties, embankments, superstructure, and all property of every kind and
92 description, real, personal, or mixed, and all choses in action, moneys, debts, claims, or demands of every kind belonging to said party of the first part or in any manner appurtenant to the said railroad or any part thereof, hereby conveying all the effects and property of said party of the first part, wherever situate or being, so that said party of the second part may and shall own, possess, and enjoy the same to the same extent that the same were owned, possessed, and enjoyed by said party of the first part before the execution hereof:

To have and to hold the same and every part and parcel thereof to the said party of the second part and its successors forever.

In witness whereof the said party of the first part has caused these presents to be signed by its president, sealed with its corporate seal, and the same attested by its secretary the day and year first above written.

[Official Seal Plainview Railroad Company.]

PLAINVIEW RAILROAD CO.,
By ALBERT KEEP, *President.*

Attest: J. B. REDFIELD, *Secretary.*

Signed, sealed, and delivered in presence of—
WM. A. ALLEN.
M. M. KIRKMAN.

STATE OF MINNESOTA, } ss:
County of Winona, }

Be it remembered that on this 11th day of May, A. D. eighteen hundred and eighty-one, before the subscriber, a notary public in and for said Winona county, in the State of Minnesota, personally appeared Albert Keep, known to me to be the president of the Plainview Railroad Company, and Joseph B. Redfield, to me known to be the secretary of the said railroad company, who, as such president and secretary, executed the foregoing instrument, and they severally acknowledged to me that they executed the foregoing instrument as president and secretary of said railroad company and caused the corporate seal of the said company to be affixed thereto, pursuant to authority given by the board of directors of said
93 company, as the free act and deed of the said Plainview Railroad Company for the purpose therein specified.

Witness my hand and official seal the day and year aforesaid.

[Notarial Seal of Winona County, Minnesota.]

WM. A. ALLEN,
Notary Public, Winona County, Minnesota.

STATE OF MINNESOTA, } ss:
County of Olmsted, }

I, H. R. Smith, register of deeds in and for the county of Olmsted, in the State of Minnesota, do hereby certify that I have compared the foregoing copy with the record of the original instrument as the same appears in my office, on page 403 of Book 53 of Deeds, and that the same is a true transcript of said record and of the whole thereof.

Witness my hand and official seal this 6th day of April, A. D. 1885.

H. R. SMITH,
Register of Deeds.

94 EXHIBIT "C."

District Court, Wabasha County, 3rd Judicial District.

THE TOWN OF ELGIN
vs.
THE WINONA AND ST. PETER RAILROAD COMPANY.

THE TOWN OF PLAINVIEW
vs.
THE WINONA AND ST. PETER RAILROAD COMPANY.

It is hereby stipulated and admitted as a matter of fact in each and both of the above-entitled actions as follows:

I.

That in the case of George W. Harrington against The Town of Plainview, T. G. Bolton, as chairman of the board of supervisors of the Town of Plainview, and others, referred to in the pleadings in the above-entitled action, a preliminary injunction was issued on the 11th day of November, A. D. 1878, commanding and enjoining the supervisors of the said town of Plainview to desist and refrain from issuing or delivering to the Plainview Railroad Company or to any one for it any bonds of the town of Plainview, &c.

That the action last above referred to was brought on for trial before the court, at chambers, at Winona, on the 27th day of January, 1879, and on the 6th day of February, 1879, the court made and filed his decision therein, in and by which he found and decided that the plaintiff in said action was not entitled to the relief asked for, but that the defendants were entitled to judgment dismissing the action.

II.

That on the 8th day of February, 1879, an order was made on application of the plaintiff's attorney in said last-named action staying proceedings therein, a copy of which order is hereto annexed, marked "Exhibit A."

III.

95 That on February 26th, 1879, in the last above entitled action, an order was made granting a further stay of proceedings, a copy of which order is hereto annexed, marked "Exhibit B."

IV.

That on the 11th day of March, 1879, in the last above entitled action the court made an order denying a new trial therein, a copy of which is hereto attached, marked "Exhibit C."

V.

That on the 11th day of March, 1879, bond on appeal was given by the plaintiff in the last above entitled action, a copy of which is hereto annexed, marked "Exhibit D."

VI.

That on the 15th day of March, 1879, in said last above entitled action the court rendered judgment therein that the plaintiff's action be dismissed upon the merits and the preliminary injunction dissolved, a copy of which judgment is hereto attached, marked "Exhibit E."

VII.

That on the 12th day of March, 1879, the plaintiff's attorney in said last above entitled action gave notice of an appeal to the supreme court from the order of the district court above referred to denying a new trial in said action, a copy of which notice is hereto attached, marked "Exhibit F," and on the 12th day of September, 1879, the plaintiff's attorney in said last above entitled action gave notice of an appeal to the supreme court from the judgment aforesaid, a copy of which notice is hereto attached, marked "Exhibit G."

EXHIBIT "A."

(Title.)

"On application of the plaintiff herein it is hereby ordered that all proceedings herein upon or pursuant to the finding and decision of the court rendered herein be, and the same are hereby,
96 stayed for the period of twenty days from this date, that plaintiff may prepare a case or bill of exceptions herein.

Dated February 8th, 1879.

WILLIAM MITCHELL,
Judge District Court."

EXHIBIT "B."

(Title.)

"It is hereby ordered that a further stay of proceedings herein on the part of the defendants for the further period of fifteen days after the expiration of the stay heretofore granted be, and the same is hereby, granted and ordered upon application of the plaintiff herein.

Dated February 26, 1879.

WM. MITCHELL,
District Judge."

EXHIBIT "C."

(Title.)

"This action having duly come before the court upon the application of said plaintiff, duly made, for an order granting a new trial herein on the 'ground that the decision of the court made herein is contrary to law,' and said application having been duly submitted by the parties, it is ordered that said application for a new trial herein be, and the same is hereby, denied.

Dated March 11th, 1879.

WM. MITCHELL,
District Judge."

EXHIBIT "D."

(Title.)

"Know all men by these presents that we, George W. Harrington, as principal, and D. R. French and R. Burchard, as sureties, are held and firmly bound unto each and all of the defendants above named in the sum of three hundred dollars, lawful money of the United States, to be paid to the said defendants, their heirs, executors, administrators, or assigns; for the payment whereof, well and truly to be made, we, jointly and severally, bind ourselves, our
97 heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 11th day of March, A. D. 1879.

The condition of this obligation is such that whereas the said George W. Harrington, plaintiff, has appealed to the supreme court of the State of Minnesota from that certain order herein of said district court made and dated on this 11th day of March, 1879, refusing a new trial herein and from the whole of said order:

Now, therefore, if said G. W. Harrington, such appellant, shall and will well and truly pay all costs and charges which may be awarded against him on such appeal, not exceeding the penalty of this bond, then this obligation shall be void; otherwise of force.

In testimony whereof we have hereunto set our hands and seals on the 11th day of March, 1879.

GEO. W. HARRINGTON. [SEAL.]
D. R. FRENCH. [SEAL.]
R. BURCHARD. [SEAL.]

Signed, sealed, and delivered in presence of—
J. F. POPE.
R. C. WRIGHT.

(Justification of sureties.)

EXHIBIT "E."

(Title.)

This action having been brought to trial by the court (a jury trial having been duly waived) and a decision thereon rendered for the defendants, it is now, on motion of Wilson & Gale and C. T. Benedict, the defendants' attorneys, ordered, adjudged, and decreed that the complaint and action be dismissed upon the merits, and that the preliminary injunction issued in action on the 11th day of November, A. D. 1878, be, and the same is hereby, dissolved, and that the defendants recover of the plaintiff four and seventy-five hundredths dollars, costs of this action.

March 15, 1879.

WM. MITCHELL,
District Judge.

[District Court Seal.]
CHAS. J. STAUFF, *Clerk.*

98 EXHIBIT "F."

(Title.)

"SIRS: Take notice that said plaintiff appeals to the supreme court of said State from that certain order of said district court herein made and dated on the 11th day of March, 1879, denying a new trial in said action and from the whole of said order.

Dated March 11th, 1879.

TAYLOR & SPERRY,
Attorneys for Plaintiff.

To Messrs. Wilson & Gale, attorneys for defendants, and to Chas. J. Stauff, clerk of said district court."

EXHIBIT "G."

(Title.)

"SIRS: You will please take notice that the plaintiff herein appeals to the supreme court of said State from that certain judgment of said district court rendered and entered herein on the 15th day of March, 1879, and from the whole thereof.

Dated this 12th day of September, A. D. 1879.

TAYLOR & SPERRY,
Attorneys for Plaintiff.

To Messrs. Wilson & Gale, attorneys for defendant.

Signed at Rochester, Minn., this — day of June, 1885, said plaintiffs reserving the right to prove at the trial *said plaintiffs reserving the right*, if so advised, the records of the district or supreme court in such action.

KELLOGG & EATON AND
C. K. DAVIS,
Plaintiffs' Attorneys.
THOMAS WILSON,
Defendant's Attorney.

99 EXHIBIT "D."

STATE OF MINNESOTA, *County of Wabasha:*

District Court, Third Judicial District.

THE TOWN OF ELGIN
vs.
THE WINONA & ST. PETER RAILROAD COMPANY.

THE TOWN OF PLAINVIEW
vs.
THE WINONA AND ST. PETER RAILROAD COMPANY.

It is hereby stipulated and admitted as a matter of fact in both and each of the above-entitled actions as follows: That the judgments in the first two cases brought by Marshall & Ilsley against said towns, rendered in favor of said plaintiff by the United States circuit court, were removed by writ of error sued out by the defendants to the Supreme Court of the United States, and were by that Court dismissed before this action was brought, upon the ground that the amount in controversy upon the face of such records was less than five thousand ($5,000) dollars.

KELLOGG & EATON AND
C. K. DAVIS,
Attorneys for Plaintiff.
THOMAS WILSON,
Attorney for Defendants.

100 EXHIBIT "E."

Complaint.

Supreme Court State of Minnesota.

District Court, Third District, Wabasha County.

GEORGE W. HARRINGTON *vs.* THE TOWN OF PLAINVIEW.

The plaintiff herein complains—

1.

That the town of Plainview aforesaid is and for more than five years has been a duly organized town and municipal corporation within the said county of Wabasha; that said T. G. Bolton is and for and during all the time hereinafter mentioned has been the chairman of the board of supervisors of said town, duly elected and qualified and acting as such; that said C. E. Daniels and S. Struble are and during said time have been the remaining two supervisors of said town; that said A. B. W. Norton is and during all said time has been the town clerk of said town, all duly elected and qualified and acting as such officers of said town, respectively; that said The Plainview Railroad Company is and during all said time has been a corporation duly organized and existing under the laws of this State; that this plaintiff is and for more than five years last past has been a resident, citizen, and tax-payer of said town of Plainview, and that this plaintiff owns and is possessed of a large amount of real and personal property, all situated and being within said town and subject to taxation therein, and which is of the value of at least six thousand dollars, and which is, has been, is and will continue to be taxed and subject to taxation within said town for all purposes of taxation therein.

2.

That on the 31st day of January, 1878, said The Plainview Railroad Company made and delivered to the said town clerk of said town a proposition, in writing, signed by its president and secretary and sealed with its seal, a true copy of which proposition is hereto attached, marked "Exhibit A," and which is hereby referred to and made part of this complaint; that on said 31st day of January, 1878, said president and secretary of said railroad com-
101 pany issued a pretended notice, signed by them and sealed with the seal of said railroad company, a true copy of which notice is hereto attached, marked "Exhibit B," and which is hereto attached and referred to as and made part of this complaint, which notice was on said 31st day of January, 1878, posted up in three public places in said town and was published in a certain newspaper printed and published in said town, and that, except as above stated, no notice whatever of or concerning any of the acts, matters, or things herein related, referred to, or set out has ever been given in any manner whatever; that on the 7th day of February, 1878, various petitions—at least four in number—were made, all of the same tenor and date and each of them having attached thereto a copy of the aforesaid propositions (Exhibit A), which several petitions (except the pretended names signed thereto and such copies of said proposition) were severally in the words and figures following, to wit:

Petition.

To the town board of supervisors of the town of Plainview, in the county of Wabasha and State of Minnesota:

We, whose names are hereto subscribed, being residents of said

town and who were assessed for taxes upon real or personal estate in said town, as shown by the last assessment-roll of said town, respectfully ask you, as the proper authorities of said town, to agree to the proposition of the Plainview Railroad Company to which this petition is appended.

Dated this 7th day of February, 1878.

That afterwards, between said 7th day of February, 1878, and 30th day of March, 1878, each of said petitions were by certain persons acting for and on behalf of said railroad company privately presented to certain resident tax-payers of said town of Plainview, less than a majority of such resident tax-payers, for their signatures, and obtained their signatures thereto; that for the purpose of making it appear that a majority of the resident tax-payers of said town, as shown by the last assessment-roll thereof, had signed said petition the persons circulating and presenting the same obtained and procured to be signed thereto the signatures of a large number of copartnership firms as such firms, and thereupon counted and represented such firm signatures of so many persons residing in said town and tax-payers therein, and also obtained separately thereto the signature of the individual persons composing such copartnership firms, whose said signatures were also by them counted and represented to be signatures of resident tax-payers of said town, and also
102 obtained thereto what purports to be the signatures of a large number of minor persons signed thereto, not by such minors themselves, but by certain persons pretending thereby to act as guardians of said minors and as such guardians only, signing their names thereto, and also the signatures of certain pretended guardians of certain minors signed as such guardians only; and also the signatures of a large number of women residing in said town and the signatures of certain minor persons therein, all of which signatures were counted and represented to be the signatures of resident tax-payers of said town, having authority to sign the same and thereby bind said town, and all of the signatures aforesaid were counted and considered as part of and in order to constitute a majority of the persons residing in said town who were assessed for taxes on real or personal property in said town, as shown by the last assessment-roll thereof, and that the persons who so circulated and presented said petitions presented the same privately to certain other resident tax-payers and legal voters of said town who were assessed for taxes therein as shown by said last assessment-roll thereof, and to induce them to sign the same represented to and informed them that a majority of all persons residing in said town who were assessed for taxes therein as aforesaid had already signed the same, by reason of which the acceptance of said proposition was already assured, and that it was useless for any to withhold longer their assent or their signatures, and thereby, through such representations and not otherwise, obtained the signatures of such persons to said petitions, whereas, in fact, said representations were false, as the parties so making them well knew, a majority of such persons residing and being assessed for taxes on real or personal estate in said town as

shown by such last assessment-roll thereof not having in fact signed said petitions; that by reason of and through the acts and practice aforesaid, and not otherwise, and by counting and considering all the pretended signatures of persons and firms, women, guardians, and minors, so obtained to said petitions, and not otherwise, said several petitions were made to appear and do on their face appear to bear the signatures of a majority of the resident tax-payers of said town; that on the 30th day of March, 1878, said railroad company caused said several petitions bearing the signatures obtained thereto as aforesaid and none others, having appended thereto substantial copies of aforesaid proposition, and therewith the affidavits of certain persons to said petitions attached, to the effect that they (the affiants) after the 7th day of February, 1878, prior to the 1st day of March, 1878, formally presented said several petitions to the several persons whose names are subscribed thereto and the same were signed
103 by each of said persons in the presence of deponents, between said dates, to be delivered to said town clerk of said town.

That, except as aforesaid, no petition of any kind or nature pertaining to said proposition or its subject-matter has been made or presented to any one, or delivered to or filed with said town clerk, or laid before any of the authorities or officers of said town, and that no election has ever been called or held or vote had in said town in relation to said proposition or in relation to any aid of said town to said railroad company for any purpose or the issue of bonds by said town for the purpose of such aid or for any purpose whatever; that thereupon, at a meeting of said board of supervisors of said town held at the office of said town clerk on said 30th day of March, 1878, at which there were present all of said supervisors and said town clerk, said board of supervisors, pretending to act under and by virtue of authority conferred upon them by said petitioners and the proceedings hereinbefore recited and not otherwise, but in fact without any authority, did adopt and place on file in the office of said town clerk a resolution, a true copy of which is hereto attached and marked "Exhibit C," and which is hereby made and referred — as a part of this complaint.

That in fact said supervisors had not then and have not now any authority or power to adopt said resolutions, or to bind said town thereby, or to issue bonds as therein recited, or to waive the issue and delivering to said town (upon the issue and the delivery of such bonds) of the stock in said resolution and in said proposition referred to, and that no proceedings, acts, or steps of any kind have been at any time had, taken, or made to authorize any of the aforesaid acts by said board or any of the officers of said town, or to authorize the issue in any manner, by or in behalf of said town, of such bonds, or any bonds whatever, save only the proceedings, acts, and steps hereinbefore recited, and that the aforesaid resolution was so adopted by said board by the procurement of and at the request of the agents of said railroad company; that said railroad company, pretending to rely upon said action of said board of supervisors and the acts and proceedings hereinbefore set out as an agreement on behalf of and by said town for the issue and delivery to said railroad company of its bonds

to the amount of $50,000, of the nature and kind stated in said proposition and upon the terms therein stated, as modified by said resolution, has constructed and completed its line of railroad and now has the same graded, the ties and iron laid thereon, with the cars running thereon, in the manner in said proposition set out, and now claims and demands of said town, its proper authorities,
104 the issue and delivery to it forthwith of said bonds of said town to the said amount of $50,000, without the issue or delivery by said railroad company to or for said town of any stock or shares of its capital stock whatever, and no such shares of its capital stock have been in fact issued or delivered or in any manner offered or tendered; that said defendants, the supervisors and town clerk of said town, and particularly said chairman of said board of supervisors, and said town clerk, intend and threaten to issue and deliver and, unless restrained and enjoined therefrom by this court, will issue and deliver to said railroad company, without requiring or asking the issue or delivery by it of any shares of its capital stock whatever, the negotiable bonds of said town to the said amount of $50,000 and of the description in said proposition and in said resolution set out, which bonds so issued and delivered will thereupon be negotiated and sold, and will become a charge upon the indebtedness against said town for the payment of which the plaintiff's said property in said town will be yearly subject to taxation and taxed, and by reason thereof great and burdensome taxes for the payment of such indebtedness will annually hereafter be assessed and levied upon and become an apparent incumbrance, lien, and cloud upon the title of plaintiff to his said property, which will by reason thereof depreciate in value; that plaintiff will thereby be subjected to a multiplicity of actions to protect his rights, and will be greatly injured and embarrassed in the use and enjoyment of his said property, and will be put to great costs and expense to protect his rights and interest, and will suffer irreparable injury and damage.

That said officers or said town have no lawful authority to issue nor has said railroad company right or authority to receive any such bonds of said town.

Wherefore plaintiff prays for the judgment of this court perpetually enjoining and restraining said town and its said officers, and particularly said chairman of the said board of supervisors and said town clerk and their successors in office, from issuing or delivering to or for said railroad company any such bonds or any bonds whatever of said town, and enjoining and restraining said railroad company from accepting or receiving any such bonds of said town, and in the meantime and till the determination of this action that a temporary injunction may be issued out of and under the seal of this court against all said defendants herein restraining and enjoining said town and the said officers thereof and their successors from issuing or delivering and said railroad company from receiving any of said bonds or any bonds of said town during the
105 pendency of this suit till its final determination or the further order of the court herein; and plaintiff prays for such

other and further relief as to the court may seem just and equitable, and for judgment for his costs and disbursements herein.

TAYLOR & SPERRY,
Attorneys for Plaintiff, Winona, Minn.

The defendant's answer to the complaint:

1.

That, except as hereinafter expressly admitted, they deny the same and each and every allegation and part thereof.

2.

That they admit to be true the matters and facts alleged in the first subdivision of the complaint, and they admit and allege that on the 31st day of January, 1878, the defendant, The Plainview Railroad Company, made and delivered to the defendant, A. B. W. Norton, as town clerk of said town of Plainview, in pursuance of and in conformity with the provisions of section 4 of chapter 106 of the General Laws of 1877, a definite proposition in writing, signed by the president and secretary of said railroad company and sealed with its seal, which proposition contained a statement of the amount of bonds desired, viz., $50,000; the time when payable, viz., twenty years from the date of the same, and that the same were payable before maturity, at the option of the said town; the rate of interest which they should bear, viz., seven per cent. per annum; and said proposition also contained a statement specifying when said bonds are to be delivered with reference to the time of construction of the said railroad, viz., whenever and as soon as said railroad company shall have its line of railroad graded, the ties and iron laid thereon, with cars running thereon from a point of junction with the Winona, and St. Peter railroad in the county of Olmsted east of the west line of the town of Eyota, in said county of Olmsted, to a point within the corporate limits of the village of Plainview as the same existed on December 31, 1877, provided the same is completed during the year A. D. 1878.

That a substantial copy of said proposition is appended to the complaint and is referred to and made a part of this answer; and the said town clerk immediately on the filing of such proposition endorsed thereon the date of its receipt by him, and did forthwith transcribe the said proposition into a record book of said town.

106

3.

That within three months after the filing of said proposition with the said town clerk, to wit, on the 31st day of January, 1878, the defendant, The Plainview Railroad Company, caused notice to be given, as prescribed in the fifth section of said chapter one hundred and six of the General Laws of the year 1877, in three public places in said town of Plainview, stating that after the sixth day of February, A. D. 1878, a petition to the proper authorities of said

town, viz., to the board of supervisors of said town, of Plainview would be presented to the resident tax-payers of said town for their signatures, asking said town board of supervisors as such authorities of said town to agree to the proposition (aforesaid), a copy of which was attached to said notice, and a substantial copy of which notice and proposition is attached to the complaint herein and referred to as a part of this answer.

That the said railroad company caused said notice, with the copy of the proposition aforesaid thereto attached, to be duly posted in three public places in said town on the 31st day of January, A. D. 1878, and to be published for two successive weeks in the "Plainview News," a weekly newspaper printed and published in said town of Plainview.

That the day of the first publication of the said notice was the sixth day of February, 1878, and the day of the second publication was the 13th day of February, A. D. 1878.

4.

That within five months after the filing of said proposition as aforesaid with the said town clerk, to wit, on the 30th day of March, 1878, the defendant, The Plainview Railway Company, delivered to said town clerk substantial copies of said proposition so filed with such petition to the proper authorities of said town, asking such authorities to agree to such proposition appended thereto, bearing the signatures of a majority of the persons residing in said town who were assessed for taxes upon real or personal estate in such town, as shown by the last assessment-roll of the said town, which signatures were verified by the affidavits of some person witnessing the said signatures.

That said petitions were presented to and signed by the persons whose names are attached thereto between the seventh day of February, A. D. 1878, and on and prior to the first day of March, A. D. 1878, and a substantial copy of said petition is set out in the complaint herein and is referred to and made a part of this answer.

107 5.

That on the 30th day of March, A. D. 1878, and after all the steps aforesaid had been taken and all the acts aforesaid done, the board of supervisors of the said town of Plainview held a meeting at the office of the town clerk of the said town, at which there were present all the supervisors of said town and the said town clerk, and at such meeting the said board of supervisors determined and adjudged, among other things, as the fact was and is, "that a majority of the resident tax-payers of said town of Plainview who were assessed for taxes upon real or personal estate in said town, as shown by the last assessment-roll of said town of Plainview, had signed said petition and request;" and resolved, determined, and adjudged—

"That the said proposition of the said Plainview Railroad Company to the said town asking aid to the construction of said company's railroad by the bonds of said town in the sum of fifty thou-

sand dollars be, and the same is hereby, accepted and agreed to on the part of the said town so far as the issue of the bonds of said town to said railroad company on the terms and conditions in said proposition stated;" and resolved further "that the bonds of the said town of Plainview, to the amount of fifty thousand dollars, executed in proper legal form, with interest coupons attached, and payable as in the said proposition requested, be, and the same are hereby, authorized and directed to be issued to the said Plainview Railroad Company whenever and as soon as the said company shall have its railroad completed, with the cars running thereon, as specified in the said proposition."

And resolved further "that the issue of stock by the said Plainview Railroad Company to the town of Plainview, in said county, in consideration of the bonds of said town, in the amount of fifty thousand dollars, be, and the same is hereby, waived, and the said railroad company be, and hereby is, absolved from any and all obligation to issue the said stock."

"It being by us adjudged and determined that it will not be to the best interest of the said town to accept or receive the said stock, and on behalf and for said town of Plainview we, the supervisors of said town, as the proper authorities thereof, do hereby relinquish any and all right to the issue of the said stock of the said railroad company, and the reception of said stock is hereby declined and refused."

And the defendant, The Plainview Railroad Company, has not issued or delivered or offered to issue or deliver any of its stock to said town, for the reason that the supervisors of said town, deeming it for the interest of such town to do so, waived the issuance and delivery of said stock.

108 6.

That a copy of the resolution of the said board at said meeting is attached to the complaint and referred to and made a part of this answer.

7.

That, relying on and induced and influenced by the said several acts and doings, and particularly by the said resolution of the said board of supervisors, the defendant, The Plainview Railroad Company, constructed and had before the commencement of this action constructed its line of road, and has and had the same graded and the ties and iron laid thereon, with the cars running thereon, from a point of junction with the Winona & St. Peter railroad in the county of Olmsted east of the west line of the town of Eyota, in said county of Olmsted, to a point within the corporate limits of the village of Plainview as the same existed on December 31st, 1877, and in all respects complied with the terms and conditions specified in said proposition by it to be performed.

8.

That by reason of the premises the said The Plainview Railroad Company has claimed and does claim the said bonds of the said town, and claim to have earned and to be entitled to the same; and the other defendants herein are ready and willing to issue the same in pursuance of and in accordance with the mutual agreement aforesaid.

Wherefore the defendants demand judgment of this court that the defendant, The Plainview Railroad Company, is entitled to the said bonds, and that the same be issued and delivered to it in pursuance of the mutual agreement aforesaid, and for such other and further relief as may be just, besides costs and disbursements in this action.

WILSON & GALE AND
C. T. BENEDICT,
Defendants' Attorneys.

Verification.

109 "EXHIBIT B."

District Court, Wabasha County, State of Minnesota.

GEORGE W. HARRINGTON *vs.* TOWN OF PLAINVIEW *et al.*

It is hereby stipulated in the above-entitled action that the only points on which the plaintiff will rely or attempt to establish by proof on the trial of this action are as follows:

1.

That the proposition of the R. R. company to the town referred to in the pleading was not filed by the town clerk in his office or recorded or transcribed in any record thereof or the date of its reception by him endorsed thereon at any time prior to the signing and presentation of the petition.

2.

That the notice given, posted, and published by the R. R. company is not a valid notice under the statute on account of its insufficiency in form, and the fact that it was given by the R. R. company instead of by the town clerk, and that it was not published in time, but it is admitted that it was published as alleged in answer.

3.

That the affidavits verifying the signatures of the petition are insufficient in matter and form.

4.

That the statute under which the proceedings were had is unconstitutional and void.

5.

That the supervisors had no power or authority to waive the issuance of stock to the town by the railroad company.

Winona, January 23d, 1879.

TAYLOR & SPERRY,
Attorneys for Plaintiff.

It is admitted that the allegation of and facts set out in subdivision seven of the answer are true as therein alleged.

Findings.

Title.

This cause was by consent tried by the court, at chambers, at Winona, on the 27th day of January, A. D. 1879.

Upon commencing the trial of said cause the parties thereto filed with the court a written stipulation, a copy of which is hereto annexed and marked " B."

110 The evidence therefore was confined to the point specified and reserved in said stipulation. From the evidence I find the following facts:

1.

The proposition of the defendant railroad company to defendant town in due form was filed in the office of town clerk of said town on the 31st day of January, 1878, and a certificate of such filing endorsed thereon by him on the same day has remained on file in his office ever since. Said proposition was transcribed or recorded by said town clerk on the 30th day of March, 1878, and not before. The petition containing the signatures of the tax-payers was signed and delivered to the town clerk before said proposition had been in fact recorded by the town clerk, on the 30th day of March, 1878, as aforesaid.

2.

The affidavits verifying the signatures of the tax-payers to the petition were in words and form as follows:

STATE OF MINNESOTA, } ss:
County of Wabasha, }

A B, of the town of Plainview, in said county, being duly sworn, says that after the 7th day of February, 1878, and prior to the first day of March, 1878, he personally presented the foregoing petition to the several persons whose names are subscribed thereto above, being (number) persons in number, and the same was signed by each

of said persons in the presence of deponent between said dates, and each of said signers were then residents of said town.

(Signed) A B.

Sworn before me this 1st day of March, 1878.

C D, *Notary Public.*

From the foregoing facts I find as conclusions of law—

1.

That where the proposition of a railroad company has been duly filed in the office of the town clerk and the date of its filing endorsed thereon the mere delay of the town clerk in transcribing it into the record book of the town until after the filing and presentation of the petition of the tax-payers will not invalidate the proceedings.

2.

The notice given in this case by the railroad company of the presentation of a petition to the town authorities to the tax-payers of the town for their signatures was in accordance with subdivision first of section 7 of the acts in question.

111

3.

That the affidavits verifying the signatures of the tax-payers are in accordance with subdivision two of said section and act.

4.

That under the act in question (chapters 1 and 106 of Laws of 1877) the board of supervisors have the same power to waive the issuance of railroad stock to the town where the agreement between the railroad company and the town is arrived at through petition as where it is arrived at through election.

But even if they had not such power their attempt to exercise it would, under the fact of this case, be no ground for an injunction against the issuing of the bonds.

5.

The provisions of this act under which these proceedings were had and which provide for the issuing of bonds upon petition of a majority of the resident tax-payers of the town are not unconstitutional.

This question of the constitutionality of the act in question was the principal one discussed by counsel. I have not investigated this point very thoroughly for two reasons—

First. Whichever way it be decided it will doubtless be desired to have the question reviewed by the Supreme Court.

Second. This not being a court of last resort, I would not in any case feel warranted in holding any legislative enactment unconstitutional unless it was very clearly so.

But so far as I have investigated the question I have not been able to give my assent to the positions taken by plaintiff's counsel, notwithstanding the ability of his argument in their defense. As I understand it the argument against the constitutionality of this law is substantially this:

First. That while a municipal corporation may be compelled by legislative enactment to provide for the construction of improvements of an exclusively public character, such as an ordinary highway, yet it cannot be compelled without its consent to aid in the construction of a work like a railroad which although public in some respects is private in others.

Second. That the only true methods by which a town as a municipal corporation can legally and constitutionally express its assent are, 1st, through the electors at an election; 2d, through its municipal officers, the board of supervisors.

112 Third. That therefore the assent of tax-payers (who may not be electors) expressed through petition is not any assent on the part of the town as a corporation.

Fourth. That therefore the provision of this law which makes the issuing of the bonds compulsory upon petition of an assent of the majority of the tax-payers of the town is unconstitutional, because it requires the issue of the bonds without any legal assent thereto on part of the town.

Notwithstanding the highly respectable authorities cited, which make a distinction as to the power of the Legislature over municipal corporations between purposes which they call purely public and those which they term partly public and partly private, yet I doubt whether such distinction can be legally sustained, at least in view of certain legal principles settled by our supreme court. It is the settled doctrine of this State that the legislative control over municipal corporations, except as restrained by the constitution, is supreme.

State *vs.* McFadden, 23 Minn., 40.

That to aid a public improvement the Legislature may pass a mandatory statute compelling a town, without its consent, to defray the expense.

Guilder *vs.* Town Otsego, 20 Minn., 74.
Guilder *vs.* Town Dayton, 22 Minn., 366.

And in Davidson *vs.* Ramsey County, 18 Minn., 482, it is held that railroads are modern highways, and that a donation of money to aid in their construction is a donation for a public purpose, for which the power of taxation may lawfully be exercised. In view of these decisions it would seem that to concede the competency of a municipal corporation by its own consent, with the authority of the Legislature, to do the acts in question would be fatal to the argument that the Legislature could not compel the corporation to do the same act without its consent. Of course we are speaking simply of the question of legal power and not of propriety or justice.

But even if it be conceded that the consent of the town was necessary, yet I do not think it follows that the only methods by which

that consent could be given are through the board of supervisors or the electors of the town at the polls.

An election for the purpose of ascertaining the wishes of the town on such a question is no more recognized in the constitution than a petition of tax-payers. They are simply two different methods of getting at the same thing—the wishes of those who are to bear the burden—and it will be observed that two of the principal cases cited to the point that the assent of the town is necessary hold or at least clearly imply that an assent of tax-payers expressed through a petition would be a valid mode of expressing consent on part of a municipal corporation.

113 People *vs.* Batcheldor, 53 N. Y., 128.
Horton *vs.* Thompson, 71 N. Y., 513.

Neither can I find any case which holds that the assent of a corporation can only be given by its corporate officers or by the electors at the polls, unless the cases cited in 51 Ill. would lead logically to such a conclusion.

But it will be observed that these decisions were based mainly upon the construction which the supreme court of Illinois put upon section 5 of article 9 of their constitution, which provides "That the corporate authorities of counties, townships, &c., may be vested with power to assess and collect taxes for corporate purposes."

This is construed as a limitation upon the power of the Legislature.

That a somewhat similar provision in our constitution (sec. 5, article 11), which reads, "Any county and township organization shall have such power of local taxation as may be prescribed by law," imposes no limitation upon the Legislature in the matter of taxing municipal corporations, either as to the purposes for which or the agencies through which the tax may be imposed, is clearly settled by our own supreme court in the case of Davidson *vs.* Ramsey County and Guilder *vs.* The Town of Otsego, above cited.

In conclusion, therefore, I find that plaintiff is not entitled to the relief asked for, but that defendants are entitled to judgment dismissing the action and for costs.

February 6, 1879.

WM. MITCHELL,
District Judge.

The exhibits of the said Harrington complaint are identical with the exhibits (except Exhibit "D") which appears in or are attached to the complaint in this action.

114 District Court, Wabasha County, State of Minnesota.

GEORGE W. HARRINGTON
vs.
THE TOWN OF PLAINVIEW, T. G. BOLTON, as Chairman of the Board of Supervisors, *et al.*

It is hereby stipulated that the "proposition," "notice," "petition," and all the record and files referred to in the complaint or

answer herein may be referred to on the trial of this action or any motion therein as if set out *in hæc verbæ* in the complaint or answer, and that certified copies of said papers, records, and files, or of any of them, may be used with like force and effect as the originals, and that such originals or copies may be referred to as proof of the contents of the said originals, notwithstanding the fact that it may be admitted in the answer that the copies attached to the complaint are correct, notwithstanding the fact that the copies or originals so presented may be variant from the copies attached to the complaint or answer.

Winona, November 18th, 1878.

ROBERT TAYLOR,
Plaintiff's Attorney.
WILSON AND GALE,
Defendants' Attorneys.

Endorsed: Exhibit "A." Stipulation. Filed in the office of the clerk of the district court March 17th, 1879. Chas. J. Stauff, clerk.

115 District Court, Wabasha County, State of Minnesota.

GEORGE W. HARRINGTON *against* THE TOWN OF PLAINVIEW *et al.*

It is hereby stipulated that this action shall be tried before the judge at his chambers at any date after the twentieth day of December, A. D. 1878, either party having the right to move and bring it on for trial at such time and place, five days' previous notice of such trial to be served on the opposing party; and if the evidence cannot be conveniently obtained at Winona, then the case to be heard at Wabasha (at the court-house) at any time after the twentieth day of December, 1878, to be designated and fixed by the judge, and five days' previous notice thereof to be given to the opposite party.

Winona, November 23rd, 1878.

TAYLOR AND SPINNEY,
Plaintiff's Attorneys.
WILSON & GALE,
Defendants' Attorneys.

Endorsed: Stipulation. Filed in the office of the clerk district court this 17th day of March, A. D. 1879. Chas. J. Stauff, clerk.

116 STATE OF MINNESOTA, *County of Wabasha:*

District Court, 3rd Judicial District.

GEORGE W. HARRINGTON, Plaintiff,
against
THE TOWN OF PLAINVIEW; T. G. BOLTON, as Chairman of the Board of Supervisors of the Town of Plainview; C. E. Daniels and S. Stubbs, as Supervisors of said Town; A. B. W. Norton, as Town Clerk of said Town, and The Plainview Railroad Company, Defendants.

Know all men by these presents that we, George W. Harrington, as principal, and D. R. French and R. Burchard, as sureties, are

held and firmly bound unto each and all of the defendants above named in the sum of three hundred dollars, lawful money of the United States, to be paid to the said defendants, their heirs, executors, administrators, or assigns; for the payment whereof, well and truly to be made, we jointly and severally bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 11th day of March, A. D. 1879.

The condition of this obligation is such that whereas the said George W. Harrington, plaintiff, has appealed to the supreme court of the State of Minnesota from that certain order herein of said district court, made and dated on this 11th day of March, 1879, refusing a new trial herein and from the whole of said order:

Now, therefore, if said G. W. Harrington, such appellant, shall and will well and truly pay all costs and charges which may be awarded against him on such appeal not exceeding the penalty of this bond, then this obligation shall be void; otherwise of force.

In testimony whereof we have hereunto set our hands and seals on this 11th day of March, A. D. 1879.

GEO. W. HARRINGTON.
D. R. FRENCH.
R. BURCHARD.

Signed, sealed, and delivered in presence of—
I. F. POPE.
R. C. WRIGHT.

117 STATE OF MINNESOTA, } ss:
County of Wabasha, }

Be it known that on this 11th day of March, A. D. 1879, came before me personally George W. Harrington and D. R. French and R. Burchard, to me well known to be the same persons who executed the foregoing bond, and they severally acknowledged the same to be their own free act and deed.

[NOTARIAL SEAL.] I. F. POPE,
Notary Public.

STATE OF MINNESOTA, } ss:
County of Wabasha, }

D. R. French and R. Burchard came before me personally, and, being by me first duly sworn, doth say, each for himself, that he is the surety above named; that he is a resident and freeholder of and in this State of Minnesota and worth the amount of three hundred dollars, specified in the foregoing bond, above his debts and liabilities and exclusive of his property which is exempt from execution.

D. R. FRENCH.
R. BURCHARD.

Subscribed and sworn to before me this 11th day of March, A. D. 1879.

[NOTARIAL SEAL.] I. F. POPE,
Notary Public.

Endorsed: Bond on appeal. I hereby approve the within bond and the sureties thereon. Dated March 13th, 1879. Wm. Mitchell, district judge. Filed in the office of the clerk of the district court April 10th, 1879. Chas. J. Stauff, clerk. Taylor & Sperry, plaintiff's attorneys, Winona, Minn.

118 STATE OF MINNESOTA, *Wabasha County:*

3rd Judicial District.

I, Charles J. Stauff, clerk of district court Wabasha county, State of Minnesota, do hereby certify that I have compared the foregoing paper writing with the original judgment-roll, order denying a new trial, notice, and bond on appeal in the action therein entitled, now remaining of record in my office, and that the same is a true and correct copy and transcript of said original and the whole thereof.

Witness my hand and seal of said court, at Wabasha, this 7th day of May, A. D. 1879.

[Seal of District Court, Wabasha Co., Minn.]

CHAS. J. STAUFF, *Clerk,*
By —— ——, *Deputy.*

Endorsed: George W. Harrington, pl'ff, against The Town of Plainview *et al.*, defendants. Certified copy of judgment-roll. Filed September 13th, 1879. Sam. H. Nichols, clerk, by W. A. Nichols, deputy.

Note of Issue.

STATE OF MINNESOTA:

Supreme Court.

GEORGE W. HARRINGTON, Appellant,

vs.

THE TOWN OF PLAINVIEW; T. G. BOLTON, as Chairman of the Board of Supervisors of said Town of Plainview; C. E. Daniels and S. Struble, as Supervisors of said Town; A. B. W. Norton, as Town Clerk of said Town, and The Plainview Railroad Company, Respondents.

119 Notice of appeal, dated March 11th, A. D. 1879.
Taylor and Sperry, appellant's attorneys.
Wilson and Gale and C. T. Benedict, respondents' attorneys.

To the clerk of said court:

Please place the above-entitled action on the calendar of said court for trial at the next term thereof, and oblige

Yours truly, TAYLOR AND SPERRY,
Appellant's Attorneys.

Dated September 17th, 1879.

Endorsed: Note of issue. Filed September 18th, 1879. Sam. H. Nichols, clerk, by W. A. Nichols, dep. Taylor & Sperry, appellant's attorneys, Winona, Minn.

120 STATE OF MINNESOTA:

Supreme Court.

GEORGE W. HARRINGTON, Appellant,

vs.

THE TOWN OF PLAINVIEW; T. G. BOLTON, as Chairman of the Board of Supervisors of the Town of Plainview; C. E. Daniels and S. Struble, as Supervisors of said Town; A. B. W. Norton, as Town Clerk of said Town, and The Plainview Railroad Company, Respondents.

SIRS: Please take notice that the above-entitled action will be brought to argument and trial before said supreme court, at the supreme court rooms, at the capitol, in the city of St. Paul, in said State, at the next general term of said court to be held, according to law, on Tuesday, the 7th day of October, A. D. 1879, at the opening of said court on that day or as soon thereafter as counsel can be heard.

Dated September 18th, 1879.

TAYLOR & SPERRY,
Attorneys for Appellant.

To Messrs. Wilson & Gale, attorneys for respondents.

Endorsed: Notice of trial. Personal service of the within notice of trial is admitted this 17th day of September, 1879. Wilson & Gale, attorneys for respondents. Filed September 18th, 1879. Sam. H. Nichols, clerk, by W. A. Nichols, dep. Taylor & Sperry, appellant's attorneys, Winona.

121 STATE OF MINNESOTA:

Supreme Court. General October Term, A. D. 1879.

G. W. HARRINGTON, Appellant,
vs.
THE TOWN OF PLAINVIEW; T. G. BOLTON, as Chairman B'd of Supervisors, *et al.*, and The Plainview Railroad Company, Respondents. } No. 21. 2711.

WEDNESDAY MORNING, 9.30 O'CLOCK, *December 10th, A. D.* 1879.

Court convened pursuant to adjournment, all the justices being present.

Bonds.

Title.

This cause came on to be heard this day upon the motion of counsel for respondents to dismiss this action and appeal on the grounds that the bonds, the issuance of which this action is brought to restrain, have been issued and delivered.

Counsel for respondents, Thomas Wilson, Esq., filed motion papers, and the same was argued by counsel for the respective parties, submitted to the court for decision, and taken under advisement.

A true record.

Attest:

[SEAL.] SAM. H. NICHOLS, *Clerk.*

The foregoing is a full and true copy of the minutes of argument in the above-entitled cause.

SAM. H. NICHOLS, *Clerk.*

Endorsed: Copy of minutes of argument. Filed November 16th, A. D. 1880. Sam. H. Nichols, clerk.

122 STATE OF MINNESOTA:

Supreme Court. General October Term, A. D. 1879.

GEORGE W. HARRINGTON, Appellant,
vs.
THE TOWN OF PLAINVIEW and TOWN OFFICERS OF said TOWN and THE PLAINVIEW RAILROAD COMPANY. } No. 21. 2711.

TUESDAY MORNING, 9.30 o'CLOCK, *December 9th, A. D.* 1879.

Court convened pursuant to adjournment, all the justices being present.

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was argued by counsel for the respective parties, submitted to the court for decision, and taken under advisement.

A true record.

Attest: SAM. H. NICHOLS, *Clerk.*

The foregoing is a full and true copy of the minutes of argument in the above-entitled cause.

Attest:

[SEAL.] SAM. H. NICHOLS, *Clerk.*

Endorsed: Copy of minutes of argument. Filed November 16th, 1880. Sam. H. Nichols, clerk.

123 STATE OF MINNESOTA:

Supreme Court. October Term, A. D. 1879.

GEORGE W. HARRINGTON, Appellant,
vs.
THE TOWN OF PLAINVIEW; T. G. BOLTON, Chairman of Board of Supervisors of the Town of Plainview; C. E. Daniels and S. Struble, as Supervisors of said Town; A. B. W. Norton, as Town Clerk of said Town, and The Plainview Railroad Company, Respondents. } No. 21.

Appeal from district court, third judicial district, county of Wabasha.

This cause having been duly argued and submitted at the general October term of this court, A. D. 1879, upon the return to the appeal herein:

Now, after full and mature deliberation had thereon, it was here and hereby ordered that the judgment of the court below herein appealed from be, and the same hereby is, in all things reversed and cause remanded for judgment pursuant to opinion, and that the appellant above named have judgment accordingly.

Entered October 20th, 1880.

By the court.

Attest: SAM. H. NICHOLS, *Clerk.*

Endorsed: Copy of order for judgment. Filed November 16th, A. D. 1880. Sam. H. Nichols, clerk. Entered on page 134, — C.

I hereby certify that the foregoing is a full and true copy of the original order for judgment entered in the above-entitled cause.

Attest:

[SEAL.] SAM. H. NICHOLS, *Clerk.*

124 STATE OF MINNESOTA:

Supreme Court.

GEORGE W. HARRINGTON, Appellant,
vs.
THE TOWN OF PLAINVIEW; T. G. BOLTON, as Chairman of the Board of Supervisors of said Town of Plainview; C. E. Daniels and S. Struble, as Supervisors of said Town; A. B. W. Norton, as Town Clerk of said Town, and The Plainview Railroad Company, Respondents.

SIRS: Please take notice that at the office of the clerk of said supreme court, at the capitol, in the city of St. Paul, county of Ramsey, in said State, on the 30th day of October, A. D. 1880, at 10 o'clock in the forenoon, the appellant herein will apply to the clerk of said court to have his costs and disbursements herein taxed and allowed and judgment rendered therefor as follows:

Statutory costs, $25.00; fees of the clerk of the district court, Wabasha county, for making return on appeal, $15.25; cost of printing

paper book, $35.00; cost of printing appellant's points and authorities in chief, $15.00; cost of printing appellant's points and authorities in reply, $24.00; the fees of the clerk of said supreme court to be taxed and added by the clerk.

Yours truly,

TAYLOR & SPERRY,
Attorneys for Plaintiff.

To Messrs. Wilson and Gale, attorneys for respondents.

125 STATE OF MINNESOTA, } ss:
County of Dodge. }

Robert Taylor, having been duly sworn, on oath says that on the 25th day of October, A. D. 1879, at Kasson, in said county, he served the within notice and statement of costs and disbursements on Wilson & Gale, attorneys for the respondents in the action therein entitled, by mail, by depositing a true and correct copy thereof, enclosed in a sealed envelope addressed to said Wilson & Gale, in the city of Winona, in said State, their place of residence and of business, in the post office at said Kasson, and prepaid all the postage thereon, before the closing of the mail on said day, and between said Kasson and said Winona there was and still is regular daily communication by mail.

ROBERT TAYLOR.

Subscribed and sworn to before me this 25th day of October, A. D. 1880.

[Notarial Seal Dodge Co., Minn.]

GEO. B. EDGERTON,
Notary Public.

Appellant's Costs and Disbursements.

Supreme Court, State of Minnesota.

GEORGE W. HARRINGTON, Appellant,
vs.
THE TOWN OF PLAINVIEW; T. G. BOLTON, as Chairman of the Board of Supervisors of said Town of Plainview; C. E. Daniels and S. Struble, as Supervisors of said Town; A. B. W. Norton, as Town Clerk of said Town, and The Plainview Railroad Company, Respondents.

Statutory costs	$25 00
Fees p'd to clerk district court for return on appeal to supreme court	15 25
Fees p'd printer for paper book	35 00
" " " " app't's brief (in chief)	15 00
" " " " " " (in reply)	24 00
Fees of clerk of supreme court to be taxed and added by the clerk	9 50
	$123 75

126 I hereby allow and tax the within costs and disbursements in favor of appellant at $123.75 this 30th day of October, A. D. 1880.

Attest: SAM. H. NICHOLS, *Clerk.*

STATE OF MINNESOTA, *County of Dodge,* } ss:

Robert Taylor, having been first duly sworn, on oath says he is one of the appellant's attorneys in this action entitled above and has had the sole management of the same; that the foregoing statement of appellant's costs and disbursements in the supreme court in said action and each item thereof is just, true, and correct; that the same and each item thereof has been actually and necessarily incurred and paid therein, and is just and reasonable and worth the amount therein charged.

ROBERT TAYLOR.

Subscribed and sworn to before me this 25th day of October, A. D. 1880.

[Notarial Seal Dodge Co., Minn.]

GEORGE B. EDGERTON,
Notary Public.

Endorsed: Appellant's costs and disbursements and notice of taxation. Filed October 26th, 1880. Sam. H. Nichols, clerk. Taylor & Sperry, appellant's attorneys, Kasson, Minn.

Supreme Court, State of Minnesota. October Term, A. D. 1879.

GEORGE W. HARRINGTON, Appellant,
vs.
THE TOWN OF PLAINVIEW; T. G. BOLTON, Chairman of the Board of Supervisors of the Town of Plainview; C. E. Daniels and S. Struble, as Supervisors of said Town; A. B. W. Norton, as Town Clerk of said Town, and The Plainview Railroad Company, Respondents. } No. 21.

Pursuant to an order of court duly made and entered in this cause on the 20th day of October, A. D. 1880. it is here and hereby determined and adjudged that the judgment of the court below,
herein appealed from, to wit, of the district court of the third
127 judicial district, sitting within and for the county of Wabasha, be, and the same is, in all things reversed and cause remanded for judgment pursuant to opinion; and it is further determined and adjudged that the appellant above named do have and recover of said The Town of Plainview; T. G. Bolton, as chairman of the board of supervisors of the town of Plainview; C. E. Daniels and S. Struble, as supervisors of said town; A. B. W. Norton, as town clerk of said town, and The Plainview Railroad Company, respondents herein, the sum and amount of one hundred and twenty-three dollars and seventy-five cents ($123.75), costs and dis-

bursements in this cause in this court, and that said appellants have execution for the enforcement hereof.

Dated and signed this 16th day of November, 1880.

By the court.

Attest:

[SEAL.] SAM. H. NICHOLS, *Clerk.*

Statement for Judgment.

Costs allowed by statute	$25 00
Clerk's fees for making return	15 00
Printer's fees for printing paper book	35 00
" " " briefs	15 25
" " " brief, in reply	24 00
Clerk's fees, supreme court	9 50
	$123 75

STATE OF MINNESOTA, *Supreme Court:*

I, Sam. H. Nichols, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom.

Witness my hand and the seal of said supreme court, at the capitol, in the city of St. Paul, this 16th day of November, A. D. 1880.

[SEAL.] SAM. H. NICHOLS, *Clerk.*

(Endorsed:) Transcript of judgment. Filed November 16th, A. D. 1880. Sam. H. Nichols, clerk. 122, Book E. Taylor &
128 Sperry, attorneys for appellant. No. 2711. State of Minnesota supreme court. George W. Harrington, appellant, against The Town of Plainview, &c., *et al.*, respondents. Judgment-roll. Filed November 16th, 1880. Sam. H. Nichols, clerk. Taylor and Sperry, attorneys for appellant.

129 *Syllabus.*

Supreme Court. October Term, 1879.

GEORGE W. HARRINGTON, Appellant,

vs.

THE TOWN OF PLAINVIEW; T. G. BOLTON, Chairman of the Board of Supervisors of the Town of Plainview; C. E. Daniels and S. Strubles, as Supervisors of said Town; A. B. W. Norton, as Town Clerk of said Town, and The Plainview Railroad Company, Respondents.

James *vs.* Cornish, 4 N. W. Rep., 2, followed that an appeal will not be dismissed where the judgment appealed from adjudges costs against the appellant on the ground that the questions in controversy have since the appeal become mere abstract questions as be-

tween the parties. Where a statute provides two modes—one valid and the other invalid—for authorizing the officers of a municipal corporation to issue bonds of the corporation, inasmuch as the bonds when issued need recite only that they were issued under the statute, without specifying in which of the two modes the officers were authorized to issue them, and as there might be *bona fide* holders of bonds so issued, an action for injunction at the instance of the proper party will be to restrain the issuance of the bonds by the municipal officers under the invalid mode provided by the statute.

Under the constitution it is not competent for the Legislature to authorize any person or class of persons other than the electors or the officers chosen by the electors of a town to determine what action requiring local taxation the town will take in any particular case. Therefore section 7 of chapter 106, General Laws of 1877,
130 which assumed to empower a majority of the resident taxpayers (without regard to whether they were elected or not) to bind the town to issue its bonds to aid in the construction of any railroad, was unconstitutional and void.

Judgment reversed.

Supreme Court. October Term, 1879.

GEORGE W. HARRINGTON, Appellant,

vs.

THE TOWN OF PLAINVIEW; T. G. BOLTON, Chairman of the Board of Supervisors of the Town of Plainview; C. E. Daniels and S. Struble, as Supervisors of said Town; A. B. W. Norton, as Town Clerk of said Town, and The Plainview Railroad Company, Respondents.

In this case the respondents moved to dismiss the appeal on the ground that since the entry of the judgment appealed from the bonds to enjoin the issuance of which the action was brought have been issued, and that therefore the question whether the defendants ought to issue them is a mere abstract question.

This would be so were it not that the judgment is also for costs against the plaintiff.

As held by this court in James *vs.* Cornish, 4 N. W. Rep., 2, the appellant has the right to have the judgment examined to determine whether it was correct, so as to entitle defendants to costs. The motion to dismiss is therefore denied.

The point is also made that it is not a proper case for injunction, because if the statute is unconstitutional and gives no authority to issue the bonds their validity will appear on their face and there will always be a legal defense to them, in whosesoever hands they may come. If by recital of the act under which they issue their invalidity must appear on their face, so that there could be no *bona fide* holder of them, an injunction will not be — to restrain their issuance.

Township of East Oakland *vs.* Skinner, 94 U. S., 255.

But if the act be valid a mere recital in the bond that it
131 was issued under and pursuant to such act, without any further recital, is sufficient, so that a *bona fide* holder will be

protected, although there may have been a defect in the proceedings under the act to authorize the officers to issue the bonds.

Humbolt Township *vs.* Long, 92 U. S, 642.

If the act in question here were wholly void and no valid bonds could be issued under it the case would fall within the former of these decisions; but the act provides two modes for authorizing the issue of bonds, one of which is conceded to be valid and the other only is claimed to be invalid. We do not think the bond need recite under which of these provisions of the act it is issued. It is enough to refer to the act generally, and a purchaser would have the right to presume that it was issued under the valid provisions of the act. There might therefore be *bona fide* purchasers of the bonds. It is a proper case for injunction. Chapter 106, General Laws 1877, provides:

SECTION 1. "Any county, town, incorporated city, or incorporated village in this State is hereby authorized and empowered, in the manner herein provided, to aid in the construction of any railroad in this State to be constructed by any railroad company for public use by authority of any law of the State, in the manner provided and which will promote the general prosperity and welfare of the tax-payers of such municipality, and the mutual agreement hereinafter referred to, when the same shall be arrived at, shall be conclusive evidence that such railroad will so promote the general prosperity and welfare of the tax-payers of such municipality." * * *

SECTION TWO. "The aid to be contributed to the construction of any such railroad by any such county, town, city, or village shall be by the bonds of such municipality to be issued to or for the use of such railroad company." * * *

SECTION THREE. "No such bonds shall be issued to or for the use of any such railroad company and no such stock shall be issued to any such municipality until a mutual agreement in relation thereto shall have been arrived at in the mode hereinafter specified; and when such mutual agreement shall have been arrived at (in either one of such modes) the proper officers of such municipality shall be authorized and required to issue and deliver such bonds in conformity with the mode so agreed upon."

Section four provides that a railroad company seeking such aid shall make and deliver to the county auditor, town clerk, or
132 city or village clerk its proposition in writing for the issuance to it of the municipal bonds.

Section five provides a mode for arriving at the "mutual agreement" mentioned in the preceding sections, which is by means of an election by the legal voters of the county, town, city, or village, as the case may be, notice of which is to be given in a mode prescribed by the county auditor or town, city, or village clerk upon receiving the proposition in which such voters vote for or against such proposition, and only in case a majority vote for it is it to be deemed accepted.

Section seven provides another mode of arriving at such "mutual agreement," as follows:

First. "Within three months after the filing of any such proposition as is specified in the fourth section of this act with any county auditor, town clerk, or clerk of any city or village, as the case may be, the said railroad company shall cause notice to be given, as prescribed in the fifth section of this act, in three public places in each election precinct in the district in which aid is desired, stating that after the day named in said notice, which shall be at least five days after its date, a petition to the proper authorities of said county, town, city, or village will be presented to the resident tax-payers of such county, town, city, or village for their signatures asking such authorities to agree to such proposition; and such petition shall be appended to a substantial copy of such proposition."

Second. "If within four months after the filing of such proposition with any such county auditor, town clerk, or clerk of any city or village, as the case may be, the said railroad company shall deliver to such clerk a substantial copy or copies of such proposition so filed with such petition to the proper authorities of such county, town, city, or village asking such authorities to agree to such proposition appended thereto, bearing the signatures of a majority of the persons residing in such county, town, city, or village who were assessed for taxes upon real or personal estate in such county, town-city, or village, as the case may be, as shown by the last assessment, roll of the district of which aid is desired, which signatures shall be verified by the affidavit of some person witnessing such signatures, then such mutual agreement for the issue of bonds by such municipality and of stock by such railroad company shall be deemed and considered to have been arrived at and perfected, and there-
133 upon such bonds and stock shall be issued and delivered in conformity with the true intent and meaning of such proposition and with the provisions of this act."

The Plainview Railroad Company proceeded, for the purpose of procuring the bonds of the town of Plainview, under section seven. Having filed its proposition with the town clerk, it caused notice to be given that a petition to the town authorities asking them to agree to such proposition would be presented for signature to the resident tax-payers of the town, and within the time prescribed file with the town clerk a copy of the proposition, with the petition appended, bearing the signatures, properly verified, of a majority of the resident tax-payers of the town.

To enjoin the issuance of the town bonds to the railroad company under these proceedings this action is brought. The court below dismissed the action on the merits.

The case necessarily involves the consideration of the validity of section seven of the act*ion* cited. The proposition was made and very largely discussed both in the oral arguments and in the briefs that it is competent for the Legislature to impose on a municipal corporation, a city, county, or town the burden of constructing or contributing to the expense of constructing a railroad to be owned and operated for public uses by a private corporation.

It is unnecessary to express any opinion on this. The Legislature has not assumed to impose such burden on the town of Plain-

view. It has not determined that it ought to nor exacted that it shall issue these bonds, nor passed in any way on the necessity or expediency of the town issuing them, nor on the question that the public interests of the town will be to any extent subserved by the construction of this road.

Nor does the act authorize either the electors of the town nor the town officers to determine that question. The petition, it is true, is addressed to the municipal authorities, but they have no power given them to accept or reject it. When the petition is signed by a majority of the resident tax-payers the proper town officers are authorized and required to issue the bonds, and no discretion is left them in the matter.

What the section assumes to do is to empower the majority of a certain class of residents within the county, town, city, or village to determine, whether assented to or not by the electors or the proper officers, what action the municipal corporation ought to
134 and shall take in aiding a railroad company to construct its road whenever such company may seek municipal aid; to govern, direct, and control the action of the municipal corporation in such cases; to determine that the local public interests require that a corporate debt shall be incurred involving the necessity of local taxation to pay it.

It must be evident that if the Legislature may vest the resident tax-payers with power to govern the corporate action in cases of this kind it may in any and all other cases *may* give to them the entire governing power over such corporation; and if it may vest the government in this class of persons, or in any class than that indicated by the constitution, there is no limitation or control over the Legislature in its selection of the class which shall govern. It may give the power to tax-payers of a certain age, or to male tax-payers, or to the payers of taxes on real estate, or to payers of taxes on personal property, or, indeed, to any other class of persons. Conceding such power in the Legislature, it is difficult to see why, instead of indicating the persons to govern municipal corporations by indicating the class to which they shall belong, it may not indicate them by name. It is very different from the power of the Legislature to entrust the performance of a ministerial act on behalf of the corporation to a particular officer or to a person named specially for the purpose or to distribute the functions of such corporations between the electors at large and the officers elected by them or among the officers so elected.

The question really in the case, then, involves the power of the Legislature to commit the government of towns, in whole or in part, to others than the electors of such towns or the officers elected by them.

The provisions of the State constitution in reference to towns are very brief. Art. 2, sec. 3, reads: "Laws may be passed providing for the organization for municipal and other town purposes of any congressional or fractional townships in the several counties in the State: Provided, That when a township is divided by county lines or does not contain one hundred inhabitants it may be attached to one

or more adjoining townships or parts of townships for the purpose aforesaid."

SECTION 4. "Provision shall be made by law for the election of such county or township officers as may be necessary."

135 SECTION 5. "Any county and township organization shall have such powers of local taxation as may be prescribed by law."

ART. 7, SECTION 1. "Every male person of the age of twenty-one years or upwards belonging to either of the following classes who shall have resided in the United States one year and in this State four months next preceding any election shall be entitled to vote at such election in the election district in which he shall at the time have been for ten days a resident for all officers that now are or hereafter may be elected by the people."

Then follows a specification of the classes of persons from whom the electors are taken.

SECTION 6. "All elections shall be by ballot, except for such town officers as may be directed by law to be otherwise chosen."

To give the Legislature power to enable women to vote for officers of schools or upon any measure relating to schools an amendment to the constitution was adopted in 1875. Except in this particular the Legislature cannot enlarge or restrict the elective franchise.

From these clauses in the constitution it is apparent that it was intended the Legislature should provide for the organization of towns, with powers of local self-government, including the power of local taxation; that the officers of such organization should be elected by ballot or otherwise, as the Legislature may prescribe, but they should be elected by the electors whose qualifications are defined in the constitution; that the powers entrusted to such organizations should be prescribed by the Legislature, and might include such, in respect to local matters, as are in their nature legislative, and that the Legislature should prescribe what officers they shall have and their respective powers and duties.

Though the language of the constitution is permissive in its form, it was undoubtedly intended to make it the duty of the Legislature to provide for such organizations.

The decentralizing governmental power and vesting it, when pertaining to merely local objects and purposes, in local organizations, so as to be exercised by those who alone are interested in and affected by its exercise, is what distinguishes American republican government from those republican governments which have been established elsewhere; and it is to be assumed that every American State constitution, unless it necessarily excludes such idea, intends to preserve this feature of American policy.

136 So far as the constitution of this State is concerned, providing for local political corporations or *quasi* corporations, as cities, counties, towns, etc., is the only instance in which or purpose for which the Legislature may delegate legislative power. It may delegate to each of such organizations the legislative power, as to local matters, deemed necessary to its well-being; but no one

could claim that the power to legislate over any of these organizations could be delegated to any but the organization itself.

Section 5, art. 2, says: "Any county and township organization shall have such powers of local taxation as may be prescribed by law."

The Legislature may prescribe how such delegated legislative power shall be exercised by the officers chosen by the electors or by the body of the electors. Those alone are recognized in the constitution as entitled to exercise political power. Mere residents or tax-payers, as such, are not regarded as qualified to exercise such power. For that purpose they must be electors or officers provided by law chosen by electors.

The corporation acts as a body politic, directly or indirectly, through those in whom political power is vested by the constitution, and the Legislature cannot provide for any others expressing the will of the corporation. In this our constitution, as we construe it, differs from those of New York and Vermont as construed by the courts of those States, and in which States legislative acts similar to that we are considering have been sustained. Thus, in Duanesburgh *vs.* Jenkins, 57 N. Y., 177, the court lay down the rule, "How the consent of a town shall be given is clearly in the discretion of the Legislature;" "the measure of consent on the part of the town and its tax-payers or electors was fixable at the will of the Legislature originally;" and in Town of Bennington *vs.* Parker, 50 Vermont, 178, the court said: "The Legislature has the undoubted right to prescribe the mode of voting by towns, school districts, and other municipal organizations, and has always exercised the right. It may rightfully provide that the action of the municipality shall be contingent upon a majority vote, two-thirds vote, or the unanimous vote of the inhabitants, and it may require the majority vote to include male tax-payers or female tax-payers and to
137 include or exclude such persons as its wisdom may determine."

Thus construing their constitutions, it follows necessarily that the Legislature might provide for the tax-payer, whether electors or not, expressing the consent and determining the action of the town; but under our constitution the action of the town must be determined by the Legislature itself or by those whom the constitution indicates for such purpose, to wit, the electors or the lawful officers elected by them and authorized so to act.

It follows that it is not competent for the Legislature to authorize any person or class of persons other than the electors or the officers chosen by the electors to determine for a town what action requiring local taxation it will take in a particular case, and that section seven of the act under consideration is invalid and any bonds issued pursuant to it void.

Judgment reversed and cause remanded for judgment pursuant to this opinion.

GILFILLAN, *C. J.*

Endorsed: Opinion and syllabus. October term, 1879. Gilfillan, C. J. Filed October 6th, 1880. Sam. H. Nichols, clerk.

138 STATE OF MINNESOTA, } ss:
Supreme Court, }

I, Sam. H. Nichols, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the return on appeal and all records of this court and opinion in the cause therein entitled as appears from the originals remaining of record in my office; that I have carefully compared the within copy with said originals, and that the same is a correct transcript therefrom and of the whole thereof.

Witness my hand and seal of said supreme court, at the capitol, in the city of St. Paul, this 13th day of May, A. D., 1885.

[Seal of the Supreme Court, State of Minnesota.]

SAM. H. NICHOLS, *Clerk.*

139 EXHIBIT "F."

STATE OF MINNESOTA:

Supreme Court. October Term, A. D. 1879.

GEORGE W. HARRINGTON, Appellant,
vs.
THE TOWN OF PLAINVIEW; T. G. BOLTON, as Chairman of the Board of Supervisors of the Town of Plainview; C. E. Daniels and S. Struble, as Supervisors of said Town; A. B. W. Norton, as Town Clerk of said Town, and The Plainview Railroad Company, Respondents. } No. 21.

Pursuant to an order of court made and entered in this cause on the 20th day of October, A. D. 1880, it is here and hereby determined and adjudged that the judgment of the court below, herein appealed from, to wit, of the district court of the third judicial district, sitting within and for the county of Wabasha, be, and the same is, in all things reversed and cause remanded for judgment pursuant to opinion; and it is further determined and adjudged that the appellant above named have and recover of said The Town of Plainview; T. G. Bolton, as chairman of the board of supervisors of the town of Plainview; C. E. Daniels and S. Struble, as supervisors of said town; A. B. W. Norton, as town clerk of said town, and The Plainview Railroad Company, respondents herein, the sum of one hundred and twenty-three dollars and seventy-five cents ($123.75), costs and disbursements in this cause in this court, and that said appellant have execution for the enforcement hereof.

Dated and signed this 16th day of November, 1880.

By the court.

Attest: [SEAL.] SAMUEL H. NICHOLS, *Clerk.*

Statement for Judgment.

Cost allowed by statute	$25 00
Clerk's fees for making return	15 00
Printer's fees for printing paper book	35 00
" " " briefs	15 25
" " " brief in reply	24 00
Clerk's fees supreme court	9 50
	$123 75

140 STATE OF MINNESOTA, *Supreme Court:*

I, Sam. H. Nichols, clerk of the supreme court, do hereby certify that the foregoing is a full and correct copy of the entry of judgment in the cause herein entitled as appears from the original remaining of record in my office, and I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom.

Witness my hand and the seal of said supreme court, at the capitol, in the city of St. Paul, this 29th day of January, A. D. 1881.

[Seal of Supreme Court of Minnesota.]

SAM. H. NICHOLS, *Clerk.*

Endorsed: State of Minnesota supreme court. George W. Harrington, appellant, against The Town of Plainview *et al.*, respondents. Transcript of judgment. Filed Feb. 10th, 1881. Charles J. Stauff, clerk. Taylor & Sperry, attorneys for appellant.

141 EXHIBIT "F."

STATE OF MINNESOTA, *County of Wabasha:*

District Court, Third Judicial District.

THE TOWN OF ELGIN, Plaintiff,

vs.

THE WINONA & ST. PETER RAILROAD CO., Def't,

and

THE TOWN OF PLAINVIEW, Plaintiff,

vs.

THE WINONA & ST. PETER RAILROAD CO., Def't.

C. T. BENEDICT, witness on behalf of the plaintiffs, having been first duly sworn, deposes and says:

By Mr. DAVIS:

Question. What is your full name?

A. Curtis T. Benedict.

Q. What is your occupation and place of residence?

A. My occupation is an attorney-at-law and my place of residence is 650 Astor street, Milwaukee, Wisconsin.

Q. Were you an attorney-at-law, resident in Rochester, Minnesota, in 1878, 1879, and 1880?

A. I was in 1878 and in 1879, until the last of March, 1880.

Q. Were you one of the attorneys for the defendants in the case of George W. Harrington against The Town of Plainview, T. G. Bolton, C. E. Daniels, S. Struble, A. B. W. Norton, and The Plainview Railroad Company, defendants, pending during those years or some of them in the district court of the State of Minnesota for the county of Wabasha?

A. I was the attorney or one of the attorneys for one or
142 more of the defendants. I was for the Plainview Railroad Company, but whether for the towns or not I am not sure now; I couldn't say without looking to the record.

Q. Who was the president of the Plainview Railroad Company in 1879 and 1880?

DEFENDANT'S COUNSEL: 1878, 1879, and 1880.

A. George W. Van Duzen was the president in 1878 and a part of 1879; whether later than that I don't know—don't remember.

Q. Down how far in 1879 do you remember that he was president?

A. My recollection is—and it is merely recollection—that he was president until the election of officers in June, 1879.

Q. Do you know whether anybody was ever elected to succeed him?

Objected to by defendant's counsel as not the best evidence.

A. I do not know, otherwise than I have been told by somebody and by whom I am not sure, that there was a president elected to succeed him.

Q. During Mr. Van Duzen's presidency what were your relations to the Plainview Company?

A. I was in the employ of G. W. Van Duzen, of G. W. Van Duzen & Company, and among my duties were to look after the interests of such matters pertaining to the Plainview railroad as Mr. Van Duzen requested me to look after, and also to look after the interests of G. W. Van Duzen & Company and G. W. Van Duzen's private matters.

Q. Did you, in that capacity, act for the Plainview Railroad Company in regard to procuring the issuance and delivery of the bonds of the towns of Plainview and Elgin here in controversy?

DEFENDANT'S COUNSEL: One moment.

A. Acting for the Plainview Railroad Company, I did.

Q. What did you do?

A. Obtained the issuance of the bonds of the towns of Viola, Elgin, and Plainview.

Q. There was never any litigation in regard to the bonds of the town of Elgin, I believe, Mr. Benedict?

A. Not that I am aware of.

Q. Assuming that in the Harrington case, before referred to in

your testimony, the action was adjudged dismissed upon the merits and the proper injunction issued therein on the 11th day of November, A. D. 1878, was dissolved by that judgment, which judgment was entered and filed on or about March 15th, 1879, what did you do immediately upon the entry of that judgment and the
143 dissolution of that injunction in regard to the bonds of the town of Plainview, and on what day did you do it?

Objected to as incompetent and immaterial.

A. Upon entry of the judgment dissolving that injunction and dismissing that action I obtained a certified copy of such judgment and went to the town of Plainview and asked the supervisors of that town to issue the bonds, which they did on the 18th and 19th of March, according to my best recollection, of 1879.

Q. Was this done before any notice was given to the plaintiffs' attorney of the dismissal of the suit and dissolution of the injunction?

DEFENDANT'S COUNSEL: What plaintiff's attorney? I object to that as incompetent and immaterial. I do not know that this witness knows anything about that; if he does, I have no objections to his answering.

A. I have no recollection on that subject at all.

Q. You were one of the defendant's attorneys. Have you any recollection of having given any such notice yourself before you took these steps?

A. I have no recollection of having given such notice.

Q. Now, Mr. Benedict, you got 50,000 dollars in bonds of the town of Plainview on the days you stated?

A. Yes, sir.

Q. Were they delivered in your hands personally?

A. They were.

Q. At Plainview?

A. At Plainview.

Q. Who filed that judgment for record in the clerk's office at Wabasha?

A. I am not positive about that. My impression is that I did.

Q. Did you not go from Rochester to Winona and draw up the judgment, have it signed by the judge, proceed from there to Wabasha, have it filed, and proceed from Wabasha to Plainview, — procure the bonds as you stated?

Objected to by defendant's counsel as incompetent, immaterial, and inadmissible under the pleadings.

A. I think not. My recollection is that the judge had himself filed his decision or sent it to the clerk of the court at Wabasha, and that I had received notice that such decision of the judge had been filed there, and that thereupon I went to Wabasha and had the proper judgment entered thereupon; that is my recollection.

Q. Now, after you got those bonds who did you deliver them to?

144 A. The bonds of the town of Plainview were, I think, sent

to M. M. Kirkman, the treasurer of the Plainview Railroad Company, by express.

Q. By you?

A. By me in connection possibly with Mr. Van Duzen. Mr. Van Duzen and I were together—that is to say, I consulted him about my actions in those matters.

Q. Was Mr. Van Duzen at Plainview with you when you got these bonds?

A. I didn't send the bonds from Plainview. I took them to Rochester with me.

Q. Was Mr. Van Duzen with you at Plainview when you got these bonds?

A. No, sir; he was not.

Q. Did you get the Elgin bonds personally?

A. I did.

Q. Were they delivered to you?

A. They were.

Q. Fifty thousand dollars?

A. No, sir; forty thousand.

Q. When did you get them? When were they delivered to you?

A. The Elgin bonds were delivered to me on the 16th day of November, I think.

Q. What year?

A. 1878.

Q. What did you do with them when you got them?

Objected to as incompetent and immaterial.

A. I took them with me to Rochester, and Mr. Van Duzen and myself went to Chicago with them, and there delivered them to Mr. M. M. Kirkman, the treasurer of the Plainview Railroad Company, in the presence of Mr. Keep and Mr. Redfield.

Q. About when did you make that delivery—immediately after you got them?

A. Yes. Those bonds were delivered (referring to memorandum) on the 20th day of November, 1878.

Mr. DAVIS: It is conceded that the 50,000 and 40,000 bonds here in question are the only bonds ever issued by these towns.

Judge WILSON: Well, it is conceded that they are the only bonds issued by these towns which at all enter into this controversy.

Mr. DAVIS: Well, that will be sufficient.

Cross-examination by Judge WILSON:

Question. Mr. Benedict, do you recollect a meeting which was had at the city of Rochester in May, 1878, at which were present Albert Keep, president of the Chicago & Northwestern Railroad
145 Company; Marvin Hughitt, its general manager; Redfield, its auditor; George W. Van Duzen, yourself, and myself?

A. I do.

Q. Do you or do you not remember whether or not at that meeting a certain memorandum in writing was made and entered into between the Northwestern Railway Company and George W. Van

Duzen touching the Plainview railroad and touching the bonds to be issued to the Plainview Railroad Company by the towns of Elgin and Plainview?

Plaintiffs' counsel objects to question as immaterial and irrelevant.

A. I remember an agreement. I remember that there was an agreement entered into between George W. Van Duzen and other parties with reference to the Plainview Railroad Company. My recollection was that it was entered into with individuals—with men who were possibly stockholders or perhaps officers of the Northwestern Railroad Company—but I have this morning seen a paper which induces me to believe that the agreement was with Mr. Van Duzen and the Northwestern Railroad Company rather than with men, as my recollection was.

Q. Well, as a matter of fact, was there any but one such agreement?

A. There was not, to my knowledge.

Q. Were or were not the transaction and steps which had previously been taken with reference to securing the bonds of the towns of Elgin and Plainview by Mr. Van Duzen discussed at that meeting and in the presence of those parties?

Plaintiffs' counsel objects as incompetent and immaterial.

A. Yes, sir; they were.

Q. Fully or not?

Same objection.

A. Very fully, I think.

Q. Was it or was it not there stated that the bonds of those towns were applied for and were to be issued on petitions signed by the tax-payers?

Plaintiffs' counsel objects as incompetent, immaterial, and irrelevant.

A. I do not know that it was stated in those terms, but my recollection is that there were copies—certified copies—of the petitions and of information, affidavits, and possibly certificates that had been obtained, showing the details of the method adopted for procuring the bonds.

Q. And those certified copies did show the fact that the bonds were applied for and the steps taken to obtain them was on petition signed by the tax-payers?

146 Plaintiffs' counsel objects to question and answer as not the best evidence, immaterial, and irrelevant.

A. Yes, sir; those certified copies did show that.

Q. Either in words there spoken or in documents there presented, was that fact made perfectly clear—the manner on which those bonds were applied for and were to be issued?

Same objection as last before.

A. I think it was fully shown by the documents there presented and examined by all the parties. I think it was fully shown.

Q. You have stated that at a prior and subsequent to this last-mentioned date, namely, May, 1878, you were in the employ of G. W. Van Duzen & Company and of Geo. W. Van Duzen, and as a part of your duties you did attend to some of these matters touching the Plainview railroad, have you not?

A. My employment and the arrangement with me was made with Mr. G. W. Van Duzen, and I was to do such work as he set me at, and my business included attending to his own private matters, the matters of the firm of G. W. Van Duzen & Company, and the matters of the Plainview railroad. As to who paid me my salary, whether the firm or the railroad, or as to whether it was out of his private pocket, I don't know.

Q. But whatever Mr. Van Duzen instructed you to do you did?

A. I did; yes, sir.

Q. And in the matters pertaining to this Plainview railroad, as in other matters, you were subject to his instruction and direction and did as he directed you?

A. Yes, sir; it was understood at the time of this transfer in May that I was to be retained in the employ of Mr. Van Duzen for the purpose of perfecting the title to the right of way of the Plainview Railroad Company, and for the purpose of doing whatever was necessary for obtaining the bonds of those towns.

Q. Was it not, Mr. Benedict, spoken that you should be—that Mr. Van Duzen should retain you to do certain things touching the right of way and do certain other matters that it was agreed between him and the Northwestern Company he should do?

A. That was the agreement—that he was to retain me to perform those things which he was to do—under his arrangement with the Northwestern Company, I believe.

Q. He agreed with the Northwestern Company to do certain things, and he agreed to retain you to assist in doing some of those things?

A. Yes, sir.

147 Q. Now, in the obtaining of the bonds of the towns of Elgin and Plainview, did you or did you not in what you did in that respect do as you were directed by Mr. Van Duzen or Mr. Redfield or Mr. Keep or all of them?

Plaintiffs' counsel objects as immaterial, incompetent, and irrelevant.

A. Well, the directions were to obtain the bonds as soon as the railroad was complete to those towns and the railroad was entitled to them, and the blank bonds were sent to me by Mr. Redfield for my opinion as to whether they were proper in form, and I made some suggestions in reply to him, and the bonds were changed in form and prepared for the special towns—prepared specially for the three towns—and then the bonds were sent to me from Mr. Redfield, with the understanding that the bonds were to be obtained at once, as soon as the railroad company was entitled to them.

What those instructions were in detail I cannot at this moment recall. Mr. Van Duzen also, advising with me, said that the bonds——

Mr. DAVIS: Judge Wilson, have you any objection to his stating what railroad he means?

Judge WILSON: Not at all.

WITNESS: I refer to the Plainview Railroad Company.

Q. You were going on to state that Mr. Van Duzen also did something.

WITNESS: Mr. Van Duzen also directed me to get the bonds of the towns of Viola, Elgin, and Plainview as soon as possible after the company had performed their contract on their part and were entitled to them.

Q. You say, too, you had corresponded with Mr. Radfield about this?

A. Yes, sir.

Q. Who is this Mr. Redfield? Is he not the auditor or secretary, or both, of the Chicago & Northwestern Railway Company, having his office in Chicago?

Plaintiffs' counsel objects as incompetent, immaterial, not warranted by the pleadings, and irrelevant.

A. I believe he is such officer, and he was at that time the secretary of the Plainview Railroad Company. As such I corresponded with him.

Q. Counsel for the plaintiff in these suits have asked you whether you were or were not one of the attorneys in the case of Harrington against The Town of Plainview and others. You stated you were. Please state who were the attorneys in that suit.

A. The firm of Wilson & Gale, I think, were the attorneys for the defendants also in that suit.

Q. With you?

A. With me; yes.

148 Q. Who was the attorney for the plaintiff?

A. Robert Taylor was. Whether he had a partner with him at that time I should have to refer to the papers to see. I think he had a partner at that time with him also. Taylor & Sperry were the attorneys for the plaintiff.

Q. Was Taylor the man who attended to the suit for the plaintiff in every respect, so far as you know?

A. Yes, sir; he was.

Q. Did you ever know Sperry to take any part in that suit whatever in any way?

A. I don't recollect that I did. I think not.

Q. Did Mr. Taylor live at that time in the city of Winona?

A. I think he did.

Q. Did Wilson & Gale live in Winona?

A. They did; yes, sir.

Q. Did Judge Mitchel live in Winona?

A. He did; yes, sir.

Q. Did or did not Wilson & Gale take the principal part in taking the steps in that suit on the part of the defendants?

A. I think they did.

Q. Have you any reason to believe that Mr. Taylor had not actual notice of every step taken in this case touching the dissolution of this injunction and the subsequent steps?

A. I have no knowledge on that matter whatever. My recollection is that the notices in the case were usually served between Mr. Taylor and the firm of Wilson & Gale, being both of them in Winona, and that so far as I was concerned, being at Rochester, fifty miles away, that most of my notices came subsequently by mail or were either by mail from Mr. Taylor or by mail from Wilson & Gale.

Q. Was not Mr. Kirkman, of whom you have spoken, at that time and long prior thereto the treasurer of the Chicago & Northwestern Railway Company—the local treasurer?

A. Well, I think he was at that time; think he had been for some time before, but for just how long I don't know.

Q. Was or was not a reference to the law under which these bonds were issued and to the section of the law which provided for an issuance on a petition of the tax-payers incorporated in and made a part of those bonds, so that that fact might be notice to everybody taking them of the steps taken prior to and as a condition to their issue?

Objected to as incompetent.

149 A. A reference to the law was incorporated in the bonds, but whether or not the particular section or sections under which they were issued were put in the bonds by number or by date of the passage of the law I cannot at this time tell without reference to the bonds themselves.

Q. According to your best recollection was not a reference made to the fact that these bonds were issued on petition of the tax-payers?

Same objection as last before.

A. Yes, sir; I am quite sure that such a statement as that was contained in the bonds.

Q. Do you know whether that was not done with the view to give notice to persons purchasing the bonds of the law under which they were issued?

Same objection as last before.

A. Yes, sir; I know that that was the fact, because I had it incorporated; because the Plainview bonds that were sent to me first were after the form that I think had been used for the issuance of bonds to the Rochester & Northern railway, in which the bonds had been obtained by a vote of the people, and it was so stated on the face of the bonds, and I called Mr. Redfield's attention to the fact that that would not meet the requirements in this instance, and that it should be stated on the face of the bonds that those bonds were

obtained by petition therefor and not by a vote of the people, and that was incorporated in the bond, that they were obtained by petition of the tax-payers.

Q. When those bonds were issued you believed, and as far as you know everybody else connected with obtaining the issue of those bonds believed, that they were legally issued and that the railroad companies had a legal right to them. Is this not so?

Objected to as immaterial.

A. Yes, sir; I certainly thought so, and I thought that the law had been complied with in every particular.

Q. So far as you know, didn't everybody else having any connection with them so believe?

Objected to as immaterial.

Q. I mean those—say Mr. Van Duzen, or Keep, or Hughitt, or Mr. Redfield, or Kirkman.

Same objection.

A. They certainly did, so far as any expression I ever heard any of them make. Certainly every care on my part was taken to make the bonds as legal and strong as possible. That was my business, what I tried to do.

Q. Do you or do you not know whether Thomas Wilson, an attorney-at-law, of Winona, Minnesota (myself), was employed by the Chicago & Northwestern Railroad Company to examine the
150 steps taken preliminary to the issuance of these bonds, and whether he was not present at that meeting in Rochester in May, 1878, to which you have referred?

Objected to as immaterial.

Q. And whether he did not, at that meeting, advise Mr. Keep, Mr. Hughitt, and Mr. Redfield that, in his opinion, those steps had been legally taken, and that those bonds, if issued thereunder after the construction of the road would be valid?

Objected to as immaterial.

A. I know that Judge Thomas Wilson was at Rochester at that meeting, and know that he did examine the papers and the proceedings that had been had with reference to the organization of the Plainview Railroad Company and with reference to the proceedings for the obtaining of the bonds in question, and I well remember that he did advise Mr. Keep, upon the special questioning and request of Mr. Keep, that, in his opinion, the proceedings had been regular, and that the bonds, if obtained upon those proceedings, would be legal and valid, and that he did not in any way see that any of the proceedings were irregular or imperfect. As to whose employ he was in at that time I do not know, further than I understood he was acting for the parties who were then negotiating with Mr. Van Duzen.

Q. Didn't he give this opinion in answer to the request of Mr. Keep for his opinion on that subject—was it not?

Objected to as immaterial.

A. It was.

Testimony read.

Q. You have heard your testimony read over, Mr. Benedict. Is there any explanation which you wish to make or any addition which you wish to make to any answer?

A. It now occurs to me that the decision of Judge Mitchell in the suit of Harrington was made and filed some time in February, I think, of 1879, and that thereupon the plaintiff made a motion for a new trial, which motion was heard by Judge Mitchell, and the new trial was by him refused; that thereupon, on or about the 11th of March, 1879, the plaintiff appealed to the supreme court of the State from the decision of Judge Mitchell from the order denying a new trial, and that no bonds were given to stay proceedings or to continue the injunction during the appeal, and that thereupon the judgment of dismissal of the action was entered, and the bonds of the town of Plainview were thereafter obtained. That is my recollection of the transaction without having had an opportunity to examine the record.

151 Redirect examination:

By Mr. DAVIS: Mr. Benedict, after you sent the Elgin bonds to Mr. Kirkman did you receive from him any receipt for those bonds?

A. The Elgin bonds were not sent to Mr. Kirkman. They were delivered to him personally, in Chicago; but on the delivery of those bonds to him personally he gave me a receipt at that time.

(Paper shown witness, marked Exhibit A.)

Q. Is that the receipt which Mr. Kirkham executed to you?

A. It is.

PLAINTIFFS' COUNSEL: I offer it in evidence.

DEFENDANT'S COUNSEL: I object to this as incompetent.

(The witness, desiring to retain the original, it is consented, subject to the above objection, that the following copy of the said document may take the place of the said original.)

DEFENDANT'S COUNSEL: I have no objection to that.

Contents of document as follows:

"Received, Chicago, November 20th, 1878, by hands of C. T. Benedict, eighty bonds of five hundred dollars each (that is, forty thousand par value), executed by the town of Elgin, Wabasha county, Minnesota, bearing date January 1st, 1879, maturing twenty years from their date, and bearing interest at the rate of seven per cent., payable annually, January 1st each year, and represented by twenty coupons attached thereto."

(Signed) M. M. KIRKMAN,
Treasurer Plainview Railroad Company.

Mr. KELLOGG:

Question. The Plainview bonds were sent by express?

WITNESS: That is my recollection, that they were sent by express from Rochester to Mr. Kirkman, at Chicago.

Mr. DAVIS: Have you any receipt for them?

A. I don't think I have. I looked this morning to see if I had and did not find it among my papers; don't think I have any receipt. It is barely possible that I may have received some letter of acknowledgment for them, but if I did I think probably it was left at Mr. Van Duzen's office, in Rochester, Minnesota, and, in fact, the bonds may have been sent down in Mr. Van Duzen's name, and the communication may have been directed to him, if there
152 was a communication or acknowledgment of the receipt of the Plainview bonds.

(Signed) C. T. BENEDICT.

Subscribed and sworn to before me April 13th, 1885.

[NOTARIAL SEAL.] W. E. STORY,
Notary Public, Milwaukee County, Wisconsin.

All irregularities in the mode of certifying or returning these depositions are waived by the parties.

153 EXHIBIT "U."

STATE OF MINNESOTA, *County of Wabasha:*

District Court, Third Judicial District.

THE TOWN OF ELGIN, Plaintiff,
vs.
THE WINONA & ST. PETER RAILROAD CO., Def't,
and
THE TOWN OF PLAINVIEW, Plaintiff,
vs.
THE WINONA & ST. PETER RAILROAD CO., Def't.

Depositions taken, pursuant to annexed notices, on behalf of the plaintiffs in the two above-entitled actions by W. E. Story, a notary public, at his office, room 34, 395 East Water street, in the city of Milwaukee, Milwaukee county, Wisconsin, on the second day of April, 1885.

Present: On behalf of the plaintiffs, C. K. Davis and Frank B. Kellogg, and on behalf of the defendants, Thomas Wilson.

CHAS. F. ILSLEY, being first duly sworn, testified as follows:

(By agreement of the parties this testimony is to be taken by a stenographer and transcribed by him, and thereafter to be subscribed by the witnesses and certified by Mr. Story.)

Examination of CHAS. F. ILSLEY by Mr. KELLOGG:

Question. Mr. Ilsley, you may state your name, place of residence, and your business.

A. Charles F. Ilsley; Milwaukee, Wisconsin; banker.

154 By Mr. DAVIS: What firm?

A. The firm of Marshall & Ilsley.

Q. Give the full names of the members; yourself and——

A. Well, it is composed of five members now. It has changed the last year or two. Samuel Marshall and——

Q. Is Samuel Marshall a member of that firm?

A. Yes, sir.

By Mr. KELLOGG:

Q. This is the Samuel Marshall and Charles F. Ilsley that were plaintiffs in the action between Samuel Marshall and Chas. F. Ilsley and The Town of Elgin?

A. Yes, sir.

Q. In the circuit court of the United States, district of Minnesota?

A. Yes, sir.

Q. Mr. Ilsley, you may state if you ever owned—if Marshall & Ilsley ever owned—any of the bonds purported to be issued by the towns of Plainview and Elgin to the Plainview Railroad Company.

A. (Referring to memorandum.) Yes; we have bought some of those bonds, in 1879.

Q. What date?

A. July 8th, 1879.

Q. Now, you may state what bonds you purchased that were issued by the town officers of the town of Plainview, giving the numbers of the bonds and when you purchased them.

A. I don't think I have the numbers here. We bought 35,000 of Plainview at that time.

Q. 35,000?

A. 35,000; yes.

Q. You may state what bonds purporting to be issued by the town officers of the town of Elgin you purchased, giving the date.

Mr. DAVIS: I should change that to what Elgin bonds. Put it right square. What bonds of the town of Elgin?

Mr. KELLOGG: What bonds of the town of Elgin?

A. We bought $35,000 of the same amount; same date—July 8th, 1879.

Q. Are they the same bonds, both of the town of Plainview and Elgin, that suits were brought by you to recover the coupons of in the circuit court of the United States?

A. Yes, sir; these bonds and others.

Mr. DAVIS:

Q. By you you meant Marshall & Ilsley as plaintiffs in that court against these towns?

A. Certainly; yes.

Q. Of both these towns you bought 70,000 in issue?

155 A. At that time; yes. I find from these books that we bought others subsequently, and it seems to me that we traded, bought, and sold.

Q. I wish to ask you, Mr. Ilsley, whether, since you bought that 70,000, you have bought other bonds of either of these towns?

A. Yes, sir.

Q. How many of Plainview, and when?

A. Well, I can't tell you about that.

Q. As near as you can state.

A. Oh, I should think we bought some eight or ten thousand of Plainview after that. Some, I should think, 2 or 3 thousand of Elgin.

Judge WILSON: How much of Elgin?

A. Two or three thousand.

By Mr. DAVIS: Can you state when those purchases were made?

A. Well, some time in the same year, I think, 1879, we bought some bonds; I think that is the time.

Q. How many during that year should you state?

A. Well, that I can't say, but my recollection is somewheres from five to ten thousand of Plainview and somewheres between two and three of Elgin.

Q. As to the balance, within what time did you buy them? Do you think they were all bought within the same year?

A. I think so; and traded.

Q. Mr. Illsley, from whom did Marshall & Ilsley purchase the $70,000 in bonds first referred to by you in your answers?

Defendants' counsel objects to this question and to the answer thereto as incompetent and irrelevant.

A. We bought them of Mr. Thomas.

Q. Of what place?

A. Here in Milwaukee.

Q. What was his business?

To the last question defendants' counsel objects as incompetent and irrelevant and to the answer thereto.

A. We supposed at the time he was agent of the Chicago & Northwestern railway.

Q. Of whom did you buy the other bonds not included in your answers just given?

A. We bought some of those of Mr. Thomas, I notice on the record, later in the season.

Q. Do you remember who you bought the others of?

A. I don't know who we bought the others of.

Q. Did you buy most of them of Mr. Thomas?

A. I think so; yes.

156 Q. Now, Mr. Ilsley, I will ask you what knowledge or notice or I am compelled to ask you what you paid for these bonds—the 70,000 that you purchased—what are the whole lot? What did you pay for the bonds that you thus bought?

To the last question and to the answer thereto the defendants' counsel objects as incompetent and irrelevant.

A. We paid 87 cents on the par value.

Q. Had you or Mr. Marshall had before or at the time you bought and paid for those bonds any knowledge or notice of any fact affecting the validity of those bonds?

Objected to by defendants' counsel and to the answer thereto as incompetent and irrelevant.

A. We had not.

Q. By whom were the negotiations which resulted in the purchase of those bonds by you and Mr. Marshall conducted?

A. On our part?

Q. Yes.

A. By myself.

Q. Exclusively?

A. I think so; yes.

Q. Now, Mr. Ilsley, since you acquired these bonds——

WITNESS: Well, of course, I conferred with Mr. Marshall; the negotiations with Mr. Thomas were made by me. I conferred with Mr. Marshall at the time.

Q. The question resolves itself into this: Whether Mr. Marshall knew anything about the history of these bonds which you yourself didn't communicate to him.

A. No; no.

Q. Now, Mr. Ilsley, have Marshall & Ilsley disposed of these bonds or any of them?

To this question and to the answer thereto the defendants' counsel objects as incompetent and immaterial.

A. Yes; we have disposed of all of them, except 3,000 Elgin bonds, which we are the owners of now.

Q. When did you thus dispose of those bonds?

A. Well, we disposed of them in 1879.

Q. To actual purchasers for cash?

A. Yes; hold on, in 1879 and 1880 we sold them. We sold 31,000 of Elgin prior, or 29,000 prior to November 21st, 1880; July 19th, up to July 19th, 1880, we sold 29,000, and up to September 1st of the Plainview—that is the following year——

DEFENDANTS' COUNSEL: September, 1880?

A. Yes, sir; 27,500 of the Plainview; yes.

Q. Now, if you will, go on and state the history of the subsequent sales that you had, if convenient there, and the dates.

DEFENDANTS' COUNSEL: To all this defendants' counsel objects as incompetent and immaterial.

157 A. I think it was in October or November of that year that we first learned of the decision or that there was a suit pending in the supreme court of the State of Minnesota; yes.

Q. That is, October or November of the year 1880?

A. That is, the decision was made, I think, in the——

Q. Harrington case?

A. Yes; latter part of October or early in November, 1880, I think it was.

Q. Now I will ask you when you first heard of the decision of the supreme court in the case of Harrington against The Town of Plainview?

Defendants' counsel objects to this and to the answer thereto.

PLAINTIFFS' COUNSEL: Well, I will modify that question a little: When did you first hear of the existence of the suit of Harrington against The Town of Plainview and The Plainview Railroad Company in the courts of Minnesota?

To this question and to the answer thereto defendants' counsel objects as incompetent and immaterial.

A. The first we knew of it we heard of the decision.

Q. Of the supreme court?

A. Yes; the first we knew of the existence of any such suit.

Q. When was that?

A. My impression is it was in either the latter part of October or early in November, 1880.

Q. That was after you had bought all these bonds?

A. Oh, yes.

Q. And paid for them?

A. A year and several months after; we bought them in July the previous year.

Q. And paid for them?

A. And paid for them; yes.

Q. And negotiated how many of them?

A. Well, we negotiated the great bulk of them at that time.

Q. Negotiated the great bulk?

A. Yes; I was going to say after that decision we didn't sell a bond at all. We didn't sell any more bonds until we obtained the decision in our suit in the United States court and the Supreme Court at Washington. I think it was in 1883 before we sold another bond.

Q. How many should you think you had on hand at the time the decision of the supreme court of Minnesota in the Harrington case was announced?

A. Well, I should say from fifteen to twenty thousand of both towns.

158 Q. Do you know, Mr. Ilsley, what became of the bonds of either of these towns which Marshall & Ilsley did not acquire?

DEFENDANTS' COUNSEL: One moment; we object to that as incompetent and immaterial.

A. There were ten thousand Plainview sold to a gentleman in—I think it was Rhode Island; Newport, Rhode Island. I think Mr. Thomas sold them to him. The only way that I know anything about it we have purchased the coupons since of those bonds sent to us.

Q. And as to the town of Elgin?

A. Some, I think, Mr. Thomas sold in Cincinnati; I don't know to whom.

Q. Have you had the coupons since?

A. Yes; we bought most of these coupons since.

Q. Do you know when these sales were made to the Rhode Island and Ohio men?

A. I think that was in 1879; I think that was shortly after the issue.

Q. Did these parties to whom Marshall & Ilsley sold the bonds of these towns and they had thus acquired pay Marshall & Ilsley full value for them?

A. Full value?

DEFENDANTS' COUNSEL: He stated how many cents on the dollar.

Mr. DAVIS: He did not state how many they paid him.

DEFENDANTS' COUNSEL: We object to that as incompetent and immaterial.

A. We sold them at various prices. What do you call a full value—par value?

Mr. DAVIS: No; I wanted to have you put a construction on that.

A. At a profit. We didn't sell any at a loss; we sold them at a profit.

Q. You sold all that you acquired to various parties at a profit?

A. Certainly; yes.

Q. For cash?

A. For cash; yes.

Cross-examination:

Q. Before you bought any of these bonds you yourself went into Minnesota to look up the matter?

A. Yes. Well, I will just explain by saying that at that time there was several other towns that issued bonds—the town of Chatfield and the town of Pine Island, and the town of Zumbrota and the town of Minneola, the village of Pine Island; and we had some negotiations with Mr. Thomas about these bonds of these other towns, so I went up to Minnesota and visited Chatfield and
159 Pine Island. I think at that time we hadn't any idea of buying these Elgin and Plainview bonds—to investigate about these bonds; and at the same time, incidentally, we learned about these Elgin and Plainview bonds—learned from Mr. Jones, attorney at Rochester.

Q. This was R. A. Jones, an attorney at Rochester?

A. Dick Jones, they generally call him.

Q. He stated to you that he had looked to the issuance of these bonds and to the taking of steps that were taken preparatory to their issue, did he not?

A. Yes, sir.

Q. And he told you what steps had been taken, and so forth?

A. Yes. It was simply an evening call. We were at Rochester and we went up to see Jones. I don't know—it wasn't about these bonds particularly.

Q. Who do you mean went to see him?

A. Thomas was with me.

Q. Thomas, who was selling these bonds, and yourself, who was purchasing them?

A. And Mr. Hanks, of Madison.

Q. Mr. Hanks was talking about buying some of them, too?

A. Yes.

Q. And you two persons who were talking about buying these bonds and the man who was selling them went to see the attorney who had taken the steps preparatory to their issue?

A. Yes.

Q. And on inquiry he told you what had been done?

A. Yes.

Q. And after that you made the purchase?

A. After that I made the purchase; yes.

Q. And still later than that you obtained a copy of the laws and of all the proceedings taken in the issue of these bonds and submitted those matters to Ex-Chief Justice Dixon, of the State of Wisconsin and of the city of Milwaukee?

A. Yes, sir.

Q. And got his opinion on it?

A. Yes.

Q. And he gave you his written opinion that the bonds were legally issued and valid?

A. In his opinion, yes.

Q. And you believed it and hadn't the least doubt about it?

A. Not the slightest; no.

PLAINTIFFS' COUNSEL: All that testimony from his visit
160 to Minnesota down to his last answer taken subject to objection as immaterial, irrelevant, incompetent, etc.

Q. Of these opinions which you had obtained as to the legality of the issue of these bonds you informed those who purchased of you or else sent them copies of the opinion?

A. Oh, yes; we showed them the opinion—those we sold bonds to here. I don't mean to say that we did in every case to those who purchased the bonds. We did in some instances, but in some instances the parties who bought the bonds believed what we told them.

Q. But some you showed this opinion?

A. I think so; yes.

Q. Subsequently you brought a suit in the circuit court of the United States for the district of Minnesota, in which Marshall & Ilsley were plaintiffs and these towns, respectively, were defendants, to collect the interest coupons of these very bonds, did you not?

A. Yes, sir.

Q. And in those suits, by the judgment of that court, you were held to be entitled to recover?

A. Yes; and have recovered.

Q. And have recovered?

A. Got one judgment paid yesterday against Plainview.

Q. You of course examined the bonds themselves before you purchased them?

A. Certainly; yes.

Q. And knew all about their contents?

A. Oh, yes.

Q. I want to ask a question further. Had you or Hanks or Thomas any acquaintance with Jones before this time which you called upon him?

A. I don't know anything about the other gentlemen. I never saw him before.

Q. So far as you know, each and every one of you went and called on him at that time as the attorney who had charge of the issuance of these bonds and of the taking of the step preparatory to their issue and to ascertain from him what those steps were and what had been done preparatory to the issue of these bonds?

A. No. As I said before, at that time we hadn't any idea of buying these Elgin and Plainview bonds at all. It was incidental that this conversation came in about these bonds.

Q. If you didn't go to see Mr. Jones about the question of these bonds what did you go to see him for?

A. Well, we went to talk with him about these other bonds
161 that we were talking of buying at that time, you know. We hadn't bought any bonds at that time at all. We were talking about buying Chatfield and Pine Island, Zumbrota, Minneola, &c.

Q. And so forth?

A. Yes, sir.

Q. And then you found out about these and asked him about these?

A. Yes; incidentally he spoke about these other bonds.

Q. About these Elgin and Plainview bonds?

A. Yes.

Q. And the conversation turned on those?

A. Turned on those; yes.

Q. And then the thought occurred to you that you would purchase these?

A. No; I guess I didn't think anything about it at that time; of course, we were interested in hearing what he had to say about it.

Q. Well, you were making this inquiry not as a matter of recreation but as a matter of business, were you not? You had nothing that called you to see Mr. Jones, except business, had you?

A. We knew that he was the attorney of the railroad at that time, at least had been taking steps in the issuance of these bonds of the various towns, and, of course, we sought him for the purpose of getting information—no doubt of it.

Redirect examination:

Q. While you were on that visit to Minnesota in which you saw Mr. Jones did you make any investigation as to the Elgin or Plainview bonds?

A. We didn't, except this conversation with Mr. Jones; that is all. If we had had any idea of buying these bonds we should have gone to those towns, but, not having any idea of buying the bonds, we didn't go.

Q. Was this a casual conversation with Mr. Jones or was it a conversation that was sought by you? Who introduced the subject?

A. We went to see him, learning that he was the attorney of the Northwestern road, in regard to the issue of these bonds—that is, that he had been employed by them to see that the proper steps had been taken; of course, we went to see him to ask him about them; ask about the other ones, about these bonds issued by the other towns.

Q. In the course of the conversation who brought up the subject of the other towns?

A. That I don't remember now.

Q. Did Mr. Jones go in that conversation into details as — the statutory steps which had been taken in regard to the issue of the Elgin and Plainview bonds?

A. I don't think he did; I don't recollect now.

162 Cross-examination:

Q. Now, Mr. Ilsley, don't you think that Mr. Jones told you about the steps which had been taken preparatory to the issue of these bonds at that time?

A. I don't recollect that he did so. I know he had no particular interest, no identical interest, in those bonds; he only told us in a general way that he had attended to the issue—that is, on the part of the railway company—by having these bonds issued, and that all steps taken were regular and legal, and that the bonds were valid. I recollect he came down on my shoulder, and says he, "They are just as good as the bonds of the United States."

Q. The Plainview and Elgin?

A. Plainview and Elgin.

Q. Well, how did he come to make that statement to you about the bonds of Plainview and Elgin being at that time just as good as the bonds of the United States if you were not enquiring about and discussing them?

A. Well, I don't know. I suppose——

Q. You don't know?

A. He wanted to facilitate the sale or something of that kind.

Q. One moment. Have you the least reason in the world for stating, Mr. Ilsley, and, if so, state what reason you have, that Mr. Jones had any interest in or desire to assist the railroad company or anybody to sell those bonds?

A. No.

Q. You say no?

A. No; I have not.

Q. Have you any reason in the world to suppose that he had any interest in or desire to do anything but answer your inquiries and give you the information sought?

A. No.

Q. So far as you now can recollect, all he did was to answer your queries and the queries of Hanks and the queries of Thomas on that occasion, and to give you such information as you asked of him about these bonds of Plainview and Elgin?

A. That was all; that was the general conversation. I have forgotten now about it.

Q. You have forgotten now about the conversation?

A. Yes.

Q. But you do remember that there was at that time and place a conversation about the issue of these bonds and the validity of the steps taken preparatory to their issue?

A. Yes.

163 Q. And may it not be that he then went on and told just what steps had been taken?

A. Possibly; but I don't remember. I think if he had I should have recollected it.

Q. Do you remember the steps which he stated had been taken

A. I don't think he could for this reason——

Q. Wait a moment; if you will just wait till I ask the question and then answer we will get along better. Do you remember the steps which he had been taking concerning the issue of the other bonds that you went there to inquire about?

A. Nothing except in a general way.

Q. Well, what did he say, then, had been done preparatory to the issue of the bonds of the town of Chatfield which you say you went there to purchase?

Objected to as immaterial and not cross-examination.

A. Well, we didn't go there on purpose; as I say, it was simply a visit; it was in a general way that the steps had been taken—that he knew what steps had been taken, and everything had been done in a valid way. I don't know as I asked him what steps had been taken, only in a general way.

Q. So far as you can remember, didn't he state to you just as much of the steps which had been taken as to the towns of Plainview and Elgin as he did as to the other towns?

A. In a general way, yes.

Q. If he didn't state to you in a particular way just as much of the steps which had been taken as to the towns of Plainview and Elgin as he did as to the other towns, state to us wherein he stated any more particulars as to the steps as to one town than the other.

A. I don't remember that he stated as to any of the towns in any particular way; don't know anything of the kind at all.

Q. You went up there with a view to make inquiries as — the bonds of certain of these towns which you wished to purchase?

A. Yes, sir.

Q. You made those inquiries and he answered all questions he was asked?

A. We didn't go to see Jones about it at all. We simply got back to Rochester and had to be there over night. We didn't go to Minnesota to see Jones at all. We were in Rochester, and when we were in Rochester we heard of Jones being there, and only went up to make him a call—that is all—and this conversation took place.

164 Q. Do you mean to say that you made him a call for any other purpose than to enquire about these bonds?

A. We had been to Chatfield, Pine Island, and Zumbrota, and were on our way home.

Q. Did you go to see him for any purpose only to inquire about these bonds and the steps taken preparatory to their issue?

A. We went to call upon Jones, and we got into the conversation about these bonds.

Q. Will you state that you went to call on Mr. Jones for any reason in the world except to inquire about these bonds?

A. I don't know; I can't tell about that.

Q. Will you state that any one of those gentleman there had any acquaintance with Jones, with Jones' relatives, or had any reason in the world to see him except to inquire about these bonds?

A. When we were in Chatfield we saw Jones' brother, I think, and he told us that his brother at Rochester had been employed on the part of the railway company to take the necessary steps to have the towns issue these bonds. We learned it from him, I guess, in the first start, and so it occurred to us we would go and see Jones that evening.

Q. That is the reason you went from Chatfield to Rochester, to see Jones?

A. No, not purposely.

Q. If there is any other reason——

A. I tell you I didn't go for that purpose; it was merely a general conversation.

Q. One moment. I wish to ask you a question and simply wish you to answer it. Did you go to see Mr. Jones for any purpose in the world except to inquire about the steps taken preparatory to the issue of these bonds? If so, state for what other purpose you or any of you went.

A. That was in 1879. I can't tell so far back; it might have been in a social way, and perhaps it was to enter into conversation about these bonds.

Q. Have you any reason to believe that you had any reason or desire to call on Mr. Jones in a social way?

A. We might have had; yes.

Q. Do you say you had?

A. I don't say, because I don't recollect.

Q. Have you any reason to believe that you had either any right or desire to call on Jones in a social way, or in any other way than to get from him the facts as to the proper steps taken with reference to the issue of these bonds?

A. Why, yes.

Q. State what reason you have to believe so.

165 A. Why, in a social way; we were there in the evening with nothing to do. I don't know who proposed to call on Jones—perhaps Mr. Hanks or Mr. Thomas—and so we went up and called upon him.

Q. In a social way?

A. Yes.

Q. You swear to that?

—. No, I don't swear to it, because I don't recollect about it.

Q. That is all I will ask you.

WITNESS: I say that the conversation with Jones had nothing to do with the purchase of these bonds. We would have purchased these other bonds whether we had ever seen Jones or not.

Q. It had a great deal to do, hadn't it, with the inquiry with reference to the steps that had been taken with reference to their issue?

A. Incidentally; we had made up our minds about these bonds before we went to see him.

Q. What other topics did you talk about?

A. Politics and the country generally.

Q. Did you?

A. I think we did; yes.

Q. You think you did?

A. I think we did; yes.

Q. Do you think you went there for that purpose?

A. I don't know about that; we spent a very pleasant evening.

Redirect examination:

Mr. DAVIS: Up to the time you called on Jones had you any knowledge of the Plainview or Elgin bonds or intention of buying them?

A. Oh, we had a knowledge of them; yes.

Q. Had you any intention of buying them?

A. We had not at that time; no.

Q. The phrase that Judge Wilson has used in his questions to you, do you understand that phrase to refer to the Plainview and Elgin bonds or to the bonds of the other towns that you had negotiated for?

A. What question did he ask me?

Q. Over and over again he used "these bonds" in question.

A. Oh, it is the bonds of all the towns; of Chatfield, Pine Island, Zumbrota—the whole batch of them.

Q. Plainview and Elgin, too?

A. Yes.

Q. The substance of it is this, Mr. Ilsley, that you got 35,000 dollars of the bonds of each of those towns by purchase?

166 A. Yes; that is it.

Q. Then, afterwards, in dealings you occasionally bought some of those bonds back after you had disposed of them?

A. That is it; yes.

Q. And it is possible that a few thousand dollars of bonds that

you had never anything to do with by original purchase came into your hands?

A. That is it; yes.

Q. Now, can you tell me about how many thousand or how many of those bonds which were not included in your original purchase ever came into the hands of Marshall & Ilsley?

A. Well, I don't think more than 2,000 or 2,500 of the Elgin, and perhaps 3,000 to 5,000 of Plainview.

(Signed) C. F. ILSLEY.

Subscribed and sworn to before me this 13th day of April, 1885.

[SEAL.] W. E. STORY,
Notary Public, Milwaukee County, Wisconsin.

NOTE.—It is admitted that where the witness in the foregoing deposition speaks of "these bonds," or of the opinion which he obtained from ex-Chief Justice Dixon as to the validity of these bonds, that he refers to the bonds of the towns of Plainview and Elgin as well as the bonds of the other towns referred to.

167 EXHIBIT "Y."

STATE OF MINNESOTA:

District Court, County of Wabasha.

GEORGE W. HARRINGTON, Plaintiff,
against
THE TOWN OF PLAINVIEW *et al.*, Defendants.

SIR: Please take notice that the plaintiff herein appeals to the supreme court of said State from that certain judgment of said district court rendered and entered herein on the 15th day of March, A. D. 1879, and from the whole thereof.

Dated September 12th, 1879.

TAYLOR & SPERRY,
Attorneys for Plaintiff.

To Messrs. Wilson & Gale, attorneys for defendants, and Charles J. Stauff, clerk of said district court.

STATE OF MINNESOTA, }
County of Winona, } *ss:*

Robert Taylor, having been first duly sworn, on oath says that on the 17th day of September, 1879, at Winona, in said county, he served the within notice of appeal upon Messrs. Wilson & Gale, the attorneys for the defendants in the action therein entitled, personally by delivering to and leaving with them at their office, in Winona aforesaid, a true and correct copy thereof.

ROBERT TAYLOR.

Subscribed and sworn to before me this 12th day of September, 1879.

[NOTARIAL SEAL.] O. B. GOULD,
Notary Public.

(Endorsed:) Notice on appeal.

Service of a copy of this within notice on us personally admitted this 13th day of September, 1879.

CHARLES J. STAUFF,
Clerk District Court.

Filed in the office of the clerk district court in and for Wabasha county, Minnesota, this 13th day of September, A. D. 1879.

CHARLES J. STAUFF, *Clerk.*

STATE OF MINNESOTA, *County of Wabasha:*

District Court, Third Judicial District.

168 GEORGE W. HARRINGTON, Plaintiff,
against
THE TOWN OF PLAINVIEW *et al.*, Defendants.

Know all men by these presents that we, George W. Harrington, as principal, and D. R. French and R. Burchard, as sureties, are held and firmly bound unto the defendants above named in the sum of two hundred and fifty dollars, lawful money of the United States, to be paid to the said defendants, their heirs, executors, administrators, or assigns; for the payment whereof, well and truly to be made, we, jointly and severally, bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 12th day of September, A. D. 1879.

The condition of this obligation is such that whereas the said plaintiff has appealed to the supreme court of the State of Minnesota from that certain judgment rendered and entered in said action in and by said district court on the 15th day of March, A. D. 1879, from the whole thereof:

Now, therefore, if said plaintiff (the appellant) shall pay all costs and charges which shall be awarded against him on such appeal and abide the judgment of the said appellate court herein, then this obligation shall be void; otherwise of force.

In testimony whereof we have hereunto set our hands and seals on this 12th day of September, A. D. 1879.

GEORGE W. HARRINGTON. [SEAL.]
D. R. FRENCH. [SEAL.]
R. BURCHARD. [SEAL.]

Signed, sealed, and delivered in presence of—
CHARLES BUTTS.
FRANK E. HARRINGTON.

All residents of Plainview, Wabasha county, Minn.

169 STATE OF MINNESOTA, } ss:
County of Wabasha, }

Be it known that on this 15th day of September, A. D. 1879, came before me personally G. W. Harrington, D. R. French, and R. Burchard, to me well known to be the same persons who executed the foregoing bond, and they severally acknowledged the same to be their own free act and deed.

[NOTARIAL SEAL.] H. H. BUTTS,
Notary Public.

STATE OF MINNESOTA, } ss:
County of Wabasha, }

D. R. French and R. Burchard came before me personally and, being by — first duly sworn, doth say, each for himself, that he is the surety above-named; that he is a resident and freeholder of and in this State of Minnesota and worth the sum of two hundred and fifty dollars, specified in the foregoing bond, above his debts and liabilities and exclusive of his property which is exempt from execution.

D. R. FRENCH.
R. BURCHARD.

Subscribed and sworn to before me on this 12th day of September, A. D. 1879.

[NOTARIAL SEAL.] H. H. BUTTS,
Notary Public.

STATE OF *Winona,* } ss:
County of Winona, }

Robert Taylor, being first duly sworn, on oath says that on the 13th day of September, —, he served the within bond personally on Wilson & Gale, attorneys for defendants in the action therein entitled, by delivering to and leaving with them a true copy thereof on said day at their office, in Winona, in said county.

ROBERT TAYLOR.

Subscribed and sworn to before me this 13th day of September, A. D. 1879.

[NOTARIAL SEAL.] WM. A. ALLEN,
Notary Public.

170 Endorsed: Bond on appeal. I hereby approve the within bond and the sureties thereon. Filed in the office of the clerk district court in and for Wabasha county, Minnesota, this 15th day of September, 1879. Chas. J. Stauff, clerk. Taylor and Sperry, plaintiff's attorneys.

STATE OF MINNESOTA, *Wabasha County*:

3rd Judicial District.

I, Chas. J. Stauff, clerk of district court, Wabasha county and State of Minnesota, do hereby certify that I have compared the fore-

going paper writing with the original notice and bond on appeal in the action therein entitled now remaining of record in my office, and that the same is a true and correct copy and transcript of said original and the whole thereof.

Witness my hand and seal of said court, at Wabasha, this 6th day of November, A. D. 1879.

[Seal District Court, Wabasha County, Minnesota.]

CHAS. J. STAUFF, *Clerk.*

Endorsed: Certified copy of notice and bond on appeal. Filed November 6th, 1879. Sam. H. Nichols, clerk.

STATE OF MINNESOTA, *ss:*

Supreme Court.

I, Sam. H. Nichols, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the notice and bond on appeal in the cause therein entitled as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom and of the whole thereof.

Witness my hand and the seal of said supreme court, at the capitol, in the city of St. Paul, this — day of ——, A. D. 188–.

[Seal of Supreme Court of State of Minnesota.]

SAM. H. NICHOLS, *Clerk.*

171 EXHIBIT "Z."

Wabasha County District Court.

THE TOWN OF ELGIN

vs.

THE WINONA AND ST. PETER RAILROAD COMPANY.

THE TOWN OF PLAINVIEW

vs.

THE WINONA AND ST. PETER RAILROAD COMPANY.

It is hereby stipulated as a fact, subject to the objection by defendant that the same is immaterial, that of the following judgments of the United States circuit court for the district of Minnesota in evidence the following have been paid by the plaintiffs at the dates hereafter stated:

As to the town of Elgin:

Judgment of October 11th, 1881	$1,696 85
Paid March 17th, 1883.	
Judgment January 10th, 1883	2,853 05
Paid June 30th, 1883.	
Judgment June 10th, 1883	1,443 91
Paid June 30th, 1883.	

As to Plainview :

Judgment October 11th, 1881	1,746 98
Paid October 12th, 1883.	
Judgment January 10th, 1883	4,154 08
Paid June 21st, 1884.	
Judgment January 10th, 1883	1,717 31
Paid April 1st, 1884.	
Judgment June 7th, 1883	2,595 57
Paid April 9th, 1885.	

KELLOGG & EATON AND C. K. DAVIS,
Plaintiff's Attorneys.
THOMAS WILSON, *Defendant's Attorney.*

172 EXHIBIT "1."

STATE OF MINNESOTA, *County of Wabasha :*

District Court, Third Judicial District.

THE TOWN OF PLAINVIEW, Plaintiff.
vs.
THE WINONA & ST. PETER RAILROAD CO., Def't,

and

THE TOWN OF ELGIN, Plaintiff,
vs.
THE WINONA & ST. PETER RAILROAD CO., Def't.

STATE OF ILLINOIS, } *ss :*
Cook County, }

Be it remembered that on this fourth day of April, A. D. 1885, personally appeared before me, John Gray, a notary public within and for the county of Cook and State of Illinois, Albert Keep to testify on behalf of the defendant in the above-entitled causes.

And the said ALBERT KEEP, having been first duly sworn to testify the truth, the whole truth, and nothing but the truth in the causes aforesaid, did depose and say as follows, to wit :

Direct examination by Judge WILSON :

Question. What is your name, age, and place of residence?

A. Albert Keep; I am fifty-eight years old; residence, the city of Chicago.

Q. Are you, and, if you are, how long have you been, president of the Chicago & Northwestern Railway Company?

173 A. I am and have been since June, 1873.

Q. In May, 1878, was Marvin Hughitt the general manager of that company?

A. I believe he was in that year. Mr. Hughitt was general superintendent for some years before he was appointed general manager.

I don't remember the year in which his title was changed. I could ascertain.

Q. Was J. B. Redfield in that month and in that year connected with this road; and, if so, what office did he hold?

A. He held the office of auditor.

Q. Was M. M. Kirkman then connected with this road; and, if so, what was his office?

A. He was connected with the road. His office was local treasurer of the company.

Q. Is Mr. Hughitt and is Mr. Kirkman and is Mr. Redfield still connected with the Northwestern railway in the same capacity?

A. Mr. Hughitt is still with the Northwestern Company and is now general manager of the company. I am not certain whether his title was general manager in 1878. If not, it was general superintendent. Mr. Redfield is still connected with the company as auditor. He held the same office in 1878. Mr. Kirkman is still connected with the company. His present official title is that of comptroller of the company. In 1878 he was local treasurer. The duties of comptroller are the same as when he was local treasurer; no change in his duties.

Q. All of these men have been continuously with the company ever since?

A. They have been.

Q. Do you remember a meeting had at Rochester, in the State of Minnesota, in May, 1878, at which was present yourself, Mr. Hughitt, Mr. Redfield, George W. Van Dusen, C. T. Benedict, and Thomas Wilson?

A. I do remember such a meeting.

Q. You may state whether at that meeting any contract or arrangement was entered into by and between George W. Van Dusen, representing the Plainview Railroad Company, and the Chicago and Northwestern Railway Company.

Counsel for plaintiff objected to the question as immaterial.

A. We did enter into such a contract on the tenth day of May, 1878.

The copy herewith presented, marked "Exhibit A," it is agreed may be connected or attached to this deposition as a part thereof, subject only to the objection of the materiality of such evidence, but no objection is made because this is a copy and not the original, and the same is offered in evidence; to which counsel for plaintiffs
174 object on the ground that it is immaterial, but not because it is a copy.

Q. The contract of which "Exhibit A" herewith presented is a copy is, as you believe, the contract which was there reduced to writing at that time?

A. I believe it is a copy of it. The original is in this building; if you would like to see it I can have it brought in.

Q. After this contract was entered into at that time did the Chicago and Northwestern Railway Company, in pursuance of that

arrangement, go on and advance money to aid in the building of that road?

Counsel for plaintiffs objected to the question as immaterial.

A. The Northwestern Company did advance money for that purpose.

Q. Did they advance that money relying on the contract made at that time that they should have the assets and especially the bonds of these towns as part security for money so advanced?

Counsel for plaintiffs objected to the question as immaterial.

A. We did.

Q. After that time did George W. Van Dusen and C. T. Benedict act under your direction in going on and taking the several steps and doing the several things necessary to complete that road and secure and obtain those bonds?

Objected to as immaterial by counsel for plaintiffs.

A. They did go on under our directions to fulfill all the obligations and secure the building of the line, and under our direction built it.

Q. And did they also, under your direction when those bonds had been, as you believed, earned, secure the bonds and send them on to you for you?

Counsel for plaintiffs objected to the question as immaterial.

A. They did. Perhaps I ought to state my recollection is that the bonds of the towns of Viola and Elgin were received through the hands of Mr. Benedict. That is my impression. The town of Plainview, after the road had been completed, was enjoined from issuing the bonds, which made considerable delay, but the injunction was dissolved, and we afterwards received the bonds of that town. All those bonds came to our hands and into our possession as in fulfillment of this contract that has been referred to here.

Q. At that meeting in Rochester, above referred to, in May,
175 1878, was Thomas Wilson present, as the attorney of the Northwestern Company, advising you and the other officers of the company as to the validity of or the regularity of the steps taken in getting the right of way and in securing these bonds?

Counsel for plaintiff objected to the question as immaterial.

A. He was.

Q. Were there present on that occasion what purported to be and what you believed to be certified copies of the several papers which had been filed and of the several orders which had been made and of the steps taken and acts done in order to secure those bonds?

Counsel for plaintiffs objected to the question as incompetent and immaterial.

A. My impression is such papers were present. I don't know that I could positively testify to a personal examination of the papers,

but I inquired very carefully into the facts in regard to this aid that the towns had promised.

Q. Had Mr. Wilson at that time, as your attorney and at your instance, examined the law and the proceedings under which these bonds were to be issued and advise you as to the legality of the steps taken and the right to the bonds in case the road was completed as proposed?

Counsel for plaintiffs objected to the question as immaterial

A. He did.

Q. What did he state to you?

Counsel for plaintiffs objected to the question as immaterial.

A. He stated to me that the bonds of the town of Plainview were issued in pursuance of a petition by a majority of the tax-payers of the town in accordance with the law of the State of Minnesota, and that the proceedings were all regular and in every respect in compliance with the law.

Q. Did he or did he not state to you that if that road was completed within the time and in the manner set out in the proposition made to those towns, and the bonds of those towns issued in pursuance of that proposition, that such bonds would be valid and legal and binding on the towns?

Counsel for plaintiffs objected to the question as immaterial.

A. He did.

Q. Did you then rely on and believe that advice to be correct and enter into this contract in pursuance of that?

176 Counsel for plaintiffs objected to the question as immaterial.

A. I did.

Q. Did you, relying on this advice and believing these things to be legal, and relying on this contract made with you by Mr. Van Dusen, go on on behalf of the Northwestern Company subsequently and furnish the money to build and complete this road?

Counsel for plaintiffs objected to the question as immaterial.

A. We did.

Q. Had you any doubt whatever when you did these things, or had any of the officers of the Northwestern road, so far as you know, who were associated with you any doubt whatever when you did these things, that these proceedings were legal, and that you were legally entitled to these bonds when you obtained them?

Counsel for plaintiffs objected to the question as immaterial.

A. I had no doubt whatever about it. I believed the bonds were legally issued. So far as I know, none of the officers had any doubt as to the validity of the bonds.

Q. And you got them solely in pursuance of the arrangement aforesaid and on account of advances by you made, as you have stated?

Counsel for plaintiffs objected to the question as immaterial.

A. We did.

Q. After that time did you sell those bonds—the Northwestern Company?

A. We did sell them.

Q. Those bonds were delivered to Mr. Kirkman, were they not, or were they, by Mr. Benedict or when sent by express?

A. I believe they were all delivered by Mr. Kirkman. It is possible that some of them were delivered at my desk and I handed them to Mr. Kirkman, but they all reached him.

Q. You were present and cognizant of all the steps taken—that is, in the delivery of those bonds?

A. Yes, sir.

Q. You do, do you not, pay attention to all the financial matters of the company, so that you knew what was being transacted?

A. Yes, sir; all such matters as that; everything relating to bonds or securities held or owned by the company.

Q. To whom did you sell those bonds?

A. My recollection is they were sold to Terrill Thomas, of Baraboo.

177 Q. Wisconsin?

A. Wisconsin.

Q. Do you know whether, before he purchased these bonds, he had himself gone into Minnesota and made examination and inquiry as to the steps taken to secure them?

A. I have no doubt whatever that he went there for that purpose. I was so informed and I believe he *do* go. I did not accompany him.

Q. But were you so informed by him?

A. I think so; I believe so. I have no doubt whatever.

Counsel for plaintiffs moved to strike out the answer as hearsay.

Q. I understood you in a previous answer to say that you knew that the bonds of the town of Plainview were issued in pursuance of a petition signed by the tax-payers rather than under an election by the electors. Did you know the same facts as to the town of Elgin?

A. I believe I did.

Q. All these matters were spoken of and discussed at that meeting at Rochester, were they not?

Counsel for plaintiffs objected to the question as immaterial.

A. Oh, yes.

Q. Mr. Keep, in the sale or transfer of these bonds who was it on the part of your company that made the negotiations?

Objected to by counsel for plaintiffs as immaterial.

A. The terms of the sale were fixed by me. The delivery of the bonds was by Mr. Kirkman in pursuance of directions he received from me.

Q. But all was either done by you or under your direction?

A. Yes, sir.

Q. In the transfer of those bonds had you or had you not any purpose or view whatever to get them into the hands of anybody against whom the towns would not have just as valid a defense as they would against your company?

Counsel for plaintiffs objected to the question as immaterial.

A. No such question entered into the sale of the bonds at all. We had no object except to get our money for the bonds, reimburse ourselves as far as we could from that source for the moneys we had expended in the building of the road.

Q. Had you any object whatever in view to prevent the town of Plainview or the town of Elgin from having any defense they would have against you?

178 Counsel for plaintiffs objected to the question as immaterial.

A. We had no such object.

Q. All these bonds, as I understand you, were sold to Mr. Thomas?

A. That is my recollection; I can ascertain that. (Witness refers to paper.) The bonds of Plainview were sold to Terrill Thomas July 10, 1879. The bonds of Elgin were sold to Terrill Thomas, $5,000 of them June 28, 1879, and $35,000 July 10, 1879.

Q. Mr. Richard A. Jones, or, as he is named in another deposition in this case, Dick Jones, was not your attorney, was he, touching this Plainview railroad at all?

A. He was not.

Q. I mean he was not the attorney for the Northwestern Company?

A. He was not.

Q. Mr. Benedict did certain matters in the premises in pursuance of this contract entered into May 10, 1878, but besides him had you any attorney but the Mr. Wilson before referred to?

A. I had not. It was stipulated in the contract that Mr. Benedict, I think, should do certain things. He had done certain things at the time we obtained control of the company, but we had no other attorney except Judge Wilson.

Q. Mr. Van Dusen before he sold you had had Mr. Jones retained in this matter, as you understand, had he not?

A. I understand that to be the case.

Q. After these bonds came into your hands, as you have above stated, or to the treasury of the Chicago & Northwestern Railroad Company did you or did you not do with them and sell and transfer them for and on behalf of the Chicago & Northwestern Company?

Objected to by counsel for plaintiffs as immaterial.

A. I did.

Q. Was there any action after they came to your hands, whatever, taken by the Plainview Railway Company or by any person

except by the officers of the Chicago & Northwestern Railroad Company?

Objected to by counsel for plaintiffs as immaterial.

A. None whatever except by the Chicago & Northwestern Company.

Q. You felt that on account of the matters that you have before narrated that the Northwestern Company had a perfect right to them and to control and dispose of them as it saw fit, did you not?

A. Yes, sir; that the Northwestern Company owned them absolutely.

179 Q. Did you ever hear one word of objection to the issuance of these bonds from any source or by any person until after this road was fully completed in pursuance of the terms of the proposition made to the towns?

Objected to by counsel for plaintiffs as immaterial.

A. I never did.

Q. Was or was not a form of these bonds drawn up and printed here and sent up there to be executed?

Objected to by counsel for plaintiffs as immaterial.

A. I believe that is the case. That is my recollection.

Cross-examination by Gov. DAVIS:

Question. Mr. Keep, while the Chicago & Northwestern Railway Company were negotiating for and when it obtained these bonds were not Messrs. Redfield and Kirkman officers in the Plainview Railroad Company?

A. I believe they were not while we were negotiating. The negotiation I refer to is this contract.

Q. Certainly.

A. Which has been put in.

Q. Were they not such officers when the Northwestern Railway Company obtained these bonds?

A. I think they were when the Northwestern obtained the bonds.

Q. What office did Mr. Redfield hold in the Plainview Company at that time?

A. I am not positive that he held any office except that of director. The old directors of the Plainview Company resigned, and it was understood that directors acceptable to the officers of the Chicago & Northwestern Railway Company should be elected in their places, which was done. In pursuance of that Mr. Redfield became a director of the company. I do not remember that he held any other office; he may have been appointed secretary.

Q. What office did Mr. Kirkman hold at that time in the Plainview Railroad Company?

A. He was first elected a director and, I think, afterwards treasurer.

Q. How long after the execution of "Exhibit A" and how long before the bonds were finally delivered to the Northwestern Com-

pany did these resignations and substitutions in the directory take place?

A. I believe the resignations were on the 10th day of May, the same day this contract was executed. I can ascertain that positively by sending for the record book, if it is important; I prefer to send after the book if it is important, but I believe the resignations were on that day.

180 Q. Those resignations and substitutions were part and parcel of the negotiations which resulted in "Exhibit A?"

A. Yes, sir; the Northwestern Company was unwilling to advance any money for the building of the road unless they had control of the direction.

Q. How much money did the Chicago & Northwestern Railway Company advance to build the Plainview road?

Counsel for defendant objected to the question as incompetent and immaterial.

A. I could not state that amount positively here. If it is important I think probably an examination of our books will show.

Q. Can you state it approximately?

A. I can make this statement, that the Chicago & Northwestern Railway Company received the proceeds of $100,000 of mortgage bonds placed on the road; a mortgage was made to the amount of $100,000 and $100,000 of bonds issued. Those bonds were sold and the proceeds were applied to repaying to the Chicago & Northwestern Company a part of the money they had advanced for the construction of the road. The proceeds of the bonds issued by the towns were also credited to the Plainview Company, and at the time the Plainview was sold to the Winona & St. Peter railroad all the funds of the Plainview Company had been used, with the exception of $9,700, which stood to the credit of the Plainview Company at that time. I could not say with accuracy, but I presume this $9,000 has been used since that time in adding to the facilities of that company.

Q. What amount of money did the first-mortgage bonds yield to the Northwestern Company?

Which question was objected to by counsel for defendant as incompetent and immaterial.

A. $88,083.33.

Q. You sold the town bonds to Thomas for 80 cents under par, did you?

A. We did.

Q. And the money which resulted from the mortgage bonds and the town bonds went into the construction of the road?

A. Yes, sir; the Chicago & Northwestern Company was reimbursed for the money that it had advanced.

Q. To aid *to* the construction?

A. Yes, sir.

Q. I presume, Mr. Keep, that the Chicago & Northwestern Com-

pany had advanced no money for this road before the contract was made, had it?

181 Objected to by counsel for defendant.

A. Previous to the making of the contract?

Q. "Exhibit A."

A. I have no recollection of any expenditure previous to that.

Q. You do not undertake to say, Mr. Keep, that you were actually present when those bonds were delivered to Mr. Kirkman or when they came to him by express, do you?

A. I cannot remember the precise method of delivery, but I know I was informed in regard to the delivery, and I think the bonds of Plainview were delivered on my own desk and that I took them in to Mr. Kirkman myself. I knew all about it at the time.

Q. How long after May 10th—the date of "Exhibit A"—was it that Mr. Redfield and Mr. Kirkman were elected directors of the Plainview Company?

A. They were elected directors of the Plainview Company on the 10th—the same day this contract was made.

Q. The resignation of the old directors and the election of new directors, suitable to your company, all took place on the day of the date of "Exhibit A," and as part and parcel of that proceeding?

A. Yes, sir.

Q. When these town bonds came into the possession of Mr. Kirkman was he not at that time the treasurer of the Plainview Company?

A. Yes, sir; I think he held the title of treasurer of the Plainview Company. The Plainview Company, however, never had a dollar in money except such as was advanced by the Chicago & Northwestern. Mr. Kirkman was at that time local treasurer of the Chicago & Northwestern Company.

Q. Stationed where?

A. Stationed here.

Judge WILSON:

Question. At Chicago?

A. Yes, sir; in this building.

Gov. DAVIS:

Question. Mr. Keep, were you ever an officer of the Plainview Company?

Counsel for defendant objected to the question as incompetent and immaterial.

A. You say ever?

Q. Yes.

A. I was not elected an officer of the company on the 10th of May, I think. I believe that Mr. Van Dusen was continued as president of the company, but I was elected a director.

Q. On the 10th of May?

A. Of the Plainview Company on the 10th of May, and my

182 impression is that at the annual election, at a later date, I was elected president of the Plainview Company.

Q. The same year?

A. I think not.

Q. When you negotiated these bonds to Thomas were you the president of the Plainview Company?

A. I could not answer that without reference to the books. I will send for them if you wish to know.

Q. I wish you would.

A. (Book produced and referred to.) June 4, 1879, I was elected president. I was not president of the Plainview Company when I gave Mr. Thomas an option for the purchase of the bonds at that price. At the time he actually took the bonds and availed himself of the option I had been elected president. The bonds were actually delivered to Thomas after I became president of the Plainview Company, but the terms of sale were agreed to before that—that is, the price. I cannot tell how many weeks I had given him the option for. He wanted to look to see if he could find purchasers, and I agreed to take 80 per cent. for them within a given time, and he finally took them at that. Now, when I gave him that option and that price I was not president of the Plainview Company. When he took the bonds and paid for them I had been elected.

Q. When you gave Mr. Thomas his option you were a director of the Plainview Company, were you not?

A. Yes, sir.

Q. At what date did you give him that option, as near as you can state?

A. I don't think I can state, but I think it was not very long after we received the bonds. I can give the dates when we received the bonds, and I think the option was given not very long after that.

Q. Give the date when you received the bonds.

A. The credit of the town of Elgin on our books for the bonds was made January 31, 1879. There was a delay in the case of Plainview. We did not receive those bonds until the 10th of July, 1879. The injunction had been removed some time before that. There was some delay in the execution of the bonds after the injunction was removed. They had to be sent up and signed and delivered afterwards.

Q. Didn't you receive those Plainview bonds about March 15, 1879, Mr. Keep?

A. Yes; we did. The date I gave was wrong. The Plainview bonds are credited on the 31st of March, 1879, but may have been received on the 15th. The 31st of March was when we closed the books for the month. Elgin is credited on the 31st of January, 1879, and Plainview on the 31st of March, 1879. The credits were made on the last day of the month.

183 Q. As near as you can recollect, how long was it after you received these bonds that you gave Thomas his option?

A. I have nothing to fix these dates by. My impression is that not very much time elapsed after we received the bonds before I gave him that option.

Q. How long an option was it?

A. I don't think I could state the precise length of that option, but I am certain that it was not an unlimited option, but that it was understood and stated to him that if within a reasonable time he decided to take them at that, that he could have them. I think that was the substance of the agreement, but it was not to be received as an offer that he might take them at any time in the future.

Redirect examination by Judge WILSON:

Question. Is Mr. Kirkman here now?

A. He is not. Mr. Kirkman went to New Orleans perhaps three weeks ago and has not returned yet.

Q. The arrangement or agreement made between yourself and other officers of the Northwestern road, on one part, and Mr. Van Dusen, representing the Plainview road, on the other part, was made, or was it not, prior to the time of the resignation of the old officers and the election of the new?

A. Certainly. The terms were agreed upon definitely before there were any changes. The changes were a result of that agreement.

Q. In your direction to Mr. Van Dusen, among other things, to obtain and transmit to you or to this place those bonds, did you or did you not act for and in behalf of the Chicago & Northwestern Railway Company?

Counsel for the plaintiffs objected to the question as immaterial and calling for the conclusion of the witness.

A. Yes, sir; exclusively on behalf of the Chicago & Northwestern Railway Company.

Q. In your negotiation with and sale of those bonds to Thomas did you or did you not act on behalf of the Chicago & Northwestern Railway Company?

Counsel for the plaintiffs objected to the question as immaterial and as calling for the conclusion of the witness.

A. Exclusively on behalf of the Chicago & Northwestern Railway Company.

Q. You have stated, I believe, have you not, in your previous examination, that after the advancement of the moneys under this contract, Exhibit "A," to build that road that the Northwestern Company was absolutely entitled to these bonds?

A. Certainly. That was the only inducement to the Northwestern Company to make the advance.

184 Q. Did you or did you not thereafter act on the theory that the Northwestern Company had the sole and exclusive right to obtain and control these bonds?

Counsel for plaintiff objected to the question as incompetent and immaterial.

A. We certainly did very definitely understand that; that was the very basis of our trade.

Q. Did or did not Mr. Kirkman do any act, except under you, with reference to these bonds?

Counsel for plaintiffs objected to the question as immaterial and incompetent.

A. He had no authority, and he did no act except as directed by me.

Q. You state that you had given Mr. Thomas an option on those bonds?

A. Yes, sir.

Q. Did he or did he not, according to your best recollection, after that option was given and before the bonds were delivered, go up into Minnesota to look after the matter?

A. I believe he did go there; that is my recollection.

Recross-examination by Gov. DAVIS:

Question. Mr. Keep, you know nothing about Thomas going to Minnesota or what he did in Minnesota except what Thomas told you, do you?

A. Yes, sir; I think others told me of his being there. I was not present with him, but I think I know it as I know Grover Cleveland was elected President of the United States; I didn't count the votes, but I believe it. And I do know that Mr. Thomas went to Minnesota, besides what he told me.

Q. What you know from information that you consider reliable?

A. Yes, sir; that is it.

It is hereby stipulated by and between the attorneys for the respective parties herein that this deposition shall be reduced to typewriting by a type-writer, and thereafter signed by the witness and certified by the notary, but no objection shall be made to the deposition on account of any informalities in the taking thereof or in the certifying thereof, or in the return thereof, provided it is signed by the witness and certified by the notary.

(Signed) ALBERT KEEP.

STATE OF ILLINOIS, } ss:
Cook County, }

I, John Gray, a notary public in and for the county of Cook and State of Illinois, do hereby certify that on the 4th day of April, A. D. 1885, by agreement of Hon. C. K. Davis and —— Kel-
185 logg, Esq., attorneys for the plaintiffs, and Hon. Thomas Wilson, attorney for the defendant, personally appeared before me, at the general offices of the Chicago & Northwestern Railway Company, in the city of Chicago, county of Cook, and State of Illinois, Albert Keep, a witness to testify on behalf of defendant in certain causes now pending in the district court of the county of Wabasha, in the third judicial district of the State of Minnesota, wherein The Town of Plainview is plaintiff and The Winona & St. Peter Railroad is defendant, and wherein The Town of Elgin is plaintiff and The Winona & St. Peter Railroad Company defendant.

And I hereby further certify that the aforesaid witness was first duly sworn to testify the truth in relation to the matter in controversy in the cause aforesaid, so far as he should be interrogated, and that the testimony of said witness was reduced by me to writing and first carefully read to said witness and the same subscribed to by said witness in my presence.

In testimony whereof I hereunto set my hand and affix my notarial seal this 6th day of April, A. D. 1885.

[SEAL.] (Signed) JOHN GRAY,
Notary Public.

186 "EXHIBIT A."

This is to certify that Geo. W. Van Dusen has, under and in accordance with the laws of the State of Minnesota, organized a corporation under the name of the Plainview Railroad Company, for the purposes fully set forth in the articles of incorporation filed in the office of the secretary of state of said State and copied into the records of said company, reference to which copy or original articles for a more full description of the purposes as therein set forth is hereby made, and has obtained aid, to be paid on bonds from the town of Plainview fifty thousand dollars, and from the town of Elgin forty thousand dollars, and from the town of Viola ten thousand dollars, and has made some progress in procuring right of way and other necessary acts and things requisite for the completion of said work, and has expended of his own means several sums and amounts of money, but from various causes appertaining to his own private business affairs is desirous of being relieved of further prosecution of the work: Now, to insure the completion thereof in good faith to the public, whose interests have become identified with the enterprise, he has proposed to the Chicago & Northwestern Railway Company, a corporation created and existing under the laws of the States of Illinois and Wisconsin, and owning and operating the Winona & St. Peter railway, in said State of Minnesota, with which this proposed railroad connects near a station named and known as Eyota, to transfer all his rights and interests in said company, all of the corporate rights of the same, all of the aid above referred to, all property and franchises acquired or to be acquired by said corportion or by himself for the benefit of the same, with the following additional conditions, which are accepted and agreed to by the said Chicago & Northwestern Railway Co.: The said Van Dusen is to keep in employ, for the purposes for which they are engaged, C. T. Benedict and D. B. Waterman, and is to pay them for their services until the road is completed and the purposes for which they have been employed are perfected; he is to procure the right of way, either by purchases or condemnation, for the whole line, paying all expenses incurred for procuring the same, whether by condemnation or purchase, and oversee and superintend, so far as he may be required so to do, the disbursements of moneys for the perfecting of right of way and completion of the road according to his best judgement and the wishes and advice of the party purchasing as well as

though the property continued to be in his possession, and for the transfer and moneys advanced by him as above stated he is to be paid in money the sum of fifteen thousand dollars and five of
187 the ten bonds (of one thousand dollars each) of aid voted by the town of Viola, which payments when made are to be in full satisfaction of all claims for moneys and expenses heretofore paid by him for the purposes above expressed and defined; and also he is to have all sums that he has paid or shall be required to pay for engineers' expenses or that he has paid or will have to pay to the owners of land or others interested therein for right of way, both by purchase and condemnation, which said sums of money the said Chicago & Northwestern Railway Co. agrees to pay and to assign to said Van Dusen any right or claim the first-named corporation may have to five thousand dollars or the bonds voted by the town of Viola, and said Van Dusen is to pay all debts and liabilities which had been contracted or incurred by the said Plainview Railroad Co., and all sums due or to grow due to said Waterman and Benedict for or on account of any services by them rendered or to be rendered for the said company or for the benefit thereof in and about the matters hereinbefore stated.

In witness whereof the parties hereto execute this agreement this 10th day of May, A. D. 1878.

(Signed) GEO. W. VAN DUSEN.
(Signed) ALBERT KEEP,
Pres't Chicago & Northwestern Railway Co., for said Company.

Received May 28th, 1878, on the within contract $10,000 in part payment of the within-mentioned $15,000. See auditor's bill No. 116,845.

(Signed) GEO. W. VAN DUSEN.

188 EXHIBITS "2" & "3."

STATE OF MINNESOTA, *County of Wabasha:*

District Court, Third Judicial District.

THE TOWN OF PLAINVIEW, Plaintiff,
vs.
THE WINONA & ST. PETER RAILROAD CO., Def't,
and
THE TOWN OF ELGIN, Plaintiff,
vs.
THE WINONA & ST. PETER RAILROAD CO., Def't.

It is hereby stipulated in each and both of the above-entitled actions that the depositions below of T. Thomas, of Baraboo, in the State of Wisconsin, and G. W. Van Dusen, of Rochester, in the State of Minnesota, shall and may be used in each of the above-entitled actions without repeating the same.

T. THOMAS, a witness called and sworn on part of the defendant, testified as follows:

Direct examination by Judge WILSON:

Question. What is your name, age, and place of residence?

A. Terrill Thomas; age, fifty-nine; place of residence, Baraboo, Wisconsin.

Q. Are you the T. Thomas who went with Mr. Ilsley to Chatfield and Rochester and other places to look after certain bonds which he proposed to purchase of the Chicago & Northwestern Railway Co. or of you?

A. Yes, sir.

Q. Was Mr. Hanks with you when you went on that trip?

189 A. Yes, sir.

Q. Who is this Mr. Hanks?

A. Cashier of the State Bank of Madison.

Q. Who owned the State Bank of Madison?

A. Mr. Marshall, Mr. Ilsley, and Mr. Hanks.

Q. Was the trip made at that time with a view to look after the bonds of certain towns?

A. Yes, sir.

Q. And to ascertain whether they had been issued properly and whether there was any objection to them by the people of those towns?

Objected to as irrelevant and immaterial.

A. Yes, sir.

Q. About what time was this trip made?

A. On the 19th of June I left home and came back on the 24th.

Q. Of what year?

A. 1879.

Q. Did you during that trip call on Richard Jones, commonly called Dick Jones, of Rochester, with those gentlemen?

A. Yes, sir; I did.

Q. Did you call on him more than once?

A. Not in company with those gentlemen.

Q. At that time, according to your best recollection, was George W. Van Dusen, of Rochester, with you?

A. I have forgotten about that. I think he must have been, from what he says in connection with it, but it has escaped me.

Q. You had gotten from Mr. Keep, president of the Chicago & Northwestern Railway Co., an option on those bonds?

A. Yes, sir.

Q. An option of how long?

A. Well, in the interview that I had with him first in regard to this matter I told him it would require thirty days to make an examination that would induce me to have anything to do with them, and he said he would give it to me.

Q. After you got that option did you, before getting the bonds, go yourself to make inquiry as to the issue of those bonds?

Objected to as irrelevant and immaterial.

A. I wrote and got some information and went and got other information to the majority of towns on the line of the road.

Q. You first wrote, you say. To whom did you write?

A. I wrote to the town treasurers of the several towns and to the county treasurers.

190 Q. After that time did you, in fact, go and visit the towns?

A. Yes, sir.

Q. For the purpose of inquiring as to the steps taken in the issuance of the bonds or before they were issued?

Objected to as irrelevant and immaterial.

A. I wanted to ascertain the general sentiment of the people in regard to the issuance of those bonds and the extent of dissatisfaction, if there was any.

Q. Did you find any dissatisfaction, or did you find any objection whatever to those bonds?

Objected to as irrelevant and immaterial.

A. Less in the case of all those towns than I have found in the case of other towns issuing bonds for the same purpose—much less.

Q. Did you or did you not know, before you got those bonds, that the bonds of the towns of Plainview and Elgin were issued in pursuance of a petition signed by the tax-payers rather than a vote of the electors of those towns?

A. I had been advised of that by Mr. Keep—that a copy of the law of Wisconsin in regard to the voting or petitioning of bonds had been transferred or engrafted into the constitution or laws of the State of Minnesota.

Q. What I wish to know is, did you, before you got those bonds, know that the towns of Plainview and Elgin had issued their bonds in pursuance of a petition signed by the tax-payers?

A. Yes, sir.

Q. Did you find any objection whatever, on your personal inquiry, as to those bonds, as to their legality or otherwise?

Objected to as irrelevant and immaterial.

A. I found a little objection in a few instances.

Q. A little objection as to what—as to the legality?

Objected to as irrelevant and immaterial.

A. No; the legality was not questioned at all; it was in respect to the per cent. of tax imposed upon some towns being more excessive than that imposed upon other towns.

Q. Were those inquiries of which you have just spoken made by you before you got the bonds?

A. Yes, sir.

Q. Before those bonds were sold to Marshall & Ilsley did Mr. Ilsley and Mr. Hanks come up and make the trip?

A. They made the trip to all the towns except Plainview and Elgin.

Q. Did they make inquiry, before they bought those bonds, of any attorneys as to the validity of those bonds?

A. Yes, sir.

Q. Of whom?

191 A. Gregory & Pinney, of Madison.

Q. Of whom else?

A. Judge Dixon, of Milwaukee.

Q. Is that Judge Dixon, the ex-chief justice of Wisconsin?

A. Yes, sir; we also relied very much upon your opinion.

Q. When you were dealing in those bonds, and after the inquiries and information of which we have spoken, had you any doubt whatever as to the validity of those bonds?

Objected to as irrelevant and immaterial.

A. No, sir.

Q. How long after you came up here yourself, as nearly as you can recollect, was it that Mr. Ilsley and Mr. Hanks came up with you?

A. I think it must have been two weeks, probably, or perhaps three weeks.

Q. Did you fully explain to them, to the best of your recollection, all you knew about those bonds, as to their mode of issue, &c.?

A. Yes, sir; I furnished them the proofs or certified copies in every case.

Q. Do you mean the certified copies of the steps taken preliminary to the issue of the bonds?

A. Yes, sir; the votes, notices, and all the legal steps.

Q. The bonds which Marshall and Ilsley purchased and received last were the bonds of Plainview and Elgin, were they not?

A. Yes, sir; the transactions were separate, though; they were entirely distinct.

Q. They were the last in time, were they not?

A. Yes, sir.

Cross-examination by F. B. KELLOGG:

Question. Do you now or have you since the first of September, 1884, owned any of those bonds, including the bonds of Plainview and Elgin?

Objected to as incompetent and immaterial.

A. No, sir; I have no interest whatever in the bonds.

Q. To whom did you sell those bonds of Plainview and Elgin?

A. They were sold to Marshall and Ilsley.

Q. All of them?

A. Yes, sir; the whole batch was sold.

Q. The ninety thousand dollars of the two towns?

A. Yes, sir; but I made a reservation of a batch of them for myself—a few thousand dollars; they made the payment for the whole lot, and I reserved ten or eleven thousand dollars on my own account.

192 Q. Did you sell these?

A. Yes, sir.

A. To whom?

A. To parties in Cincinnati.

Q. Can you give the names?

A. They were sold to the trustee of an estate, I think—minor heirs.

Q. Do you remember the name?

A. Yes, sir.

Q. To whom was the sale made?

A. Charles H. Williams, Cincinnati.

Q. How many thousands?

A. I am not quite certain; I think I sold, on two occasions, perhaps all together six or seven or eight thousand dollars.

Q. To whom did you sell the rest?

A. I sold a portion to Marshall & Ilsley and a portion to Mr. Fitch, of the National Exchange Bank.

Q. When were those sales made by you, as nearly as you can recollect?

A. You mean to Marshall & Ilsley?

Q. Yes, and to the other parties.

A. I think the bonds were delivered to them by the company in July, 1879; I think Mr. Williams must have taken his in September or October.

Q. Of the same year, 1879?

A. I think so. It may have been a little later than that.

Q. Are any of those bonds of Plainview and Elgin owned in the State of Minnesota?

Objected to as incompetent.

A. I don't know as to that.

Q. You say, Mr. Thomas, you sold those bonds; you may explain, as you started to explain, as to what relation to the Chicago & Northwestern Railway Co. you occupied when you sold those bonds—whether you bought and sold or not.

Objected to as incompetent and inconsistent with the stipulations made in this case and the pleadings in this case.

A. I had an option on the batch of bonds referred to—two hundred and fifty thousand dollars, the Plainview and Elgin bonds included—and I was the medium through which they were sold. I would advise a sale and the company would make the reference to their agent at the point of delivery, and they would notify me of that fact. I requested the agent to make the delivery to Marshall & Ilsley, and he received his pay then and there from them.

Q. The agent of whom?

193 A. The agent of the Chicago & Northwestern Railway Co.

Q. The local agent at Madison?

A. I think some of the bonds were delivered at Madison, and in that case they would have been delivered by the local agent at that point.

Q. How much did you give the Chicago & Northwestern Railway Co.?

A. The stipulation was 80 cts. and interest 85 cts. in the case of

Rochester, and I was to get my commission and my pay out of any sum I could sell them for over and above the price stipulated.

Redirect examination by Judge WILSON:

Question. You say you kept ten or eleven thousand dollars of those bonds yourself for awhile. Did you keep those of the town of Plainview or of Elgin or of some other towns?

A. I preferred to take the Plainview and Elgin bonds, of all the bonds I had.

Q. Why? Because they were the best bonds?

Objected to as irrelevant and immaterial.

A. Yes, sir; I thought there was the best prospect of those bonds being paid promptly. I thought those towns had the best resources and were the best prepared to make payment promptly.

Q. Is that the only reason why you kept them?

Objected to as irrelevant and immaterial.

A. I believed they were perfectly good and those towns were abundantly able to meet their obligations. I thought it was the best country I struck on the whole line of road.

Q. You stated in answer to a question in cross-examination that the company sent to their agent the bonds to be delivered; let me ask you whether this is the way in which that was done: After you negotiated for the sale of those bonds the company sent to your address the bonds, to be delivered on the payment for them?

A. No; you mistake. They sent a statement of the value of the security and made a notification to me. They made a statement in detail of the securities included and forwarded — to agent at Milwaukee, with the several amounts and the value and the sum total; that was made in full and in detail to their agents, and they gave me a corresponding notice in a letter addressed to me. I would put in appearance at the point of delivery and order the agent to deliver the bonds to Marshall & Ilsley and take his pay, which he did.

Q. And those bonds were sent to Milwaukee to your address and to you, to be delivered on the payment?

194 A. No; I think they were sent to the agent.

Q. To the agent for you?

A. Yes, sir; to the agent for me, and I was notified and put in an appearance and got the pay. I will say, however, that in the case of the bonds of Plainview and Elgin I notified the Chicago & Northwestern Railway Co. of the sale to Marshall & Ilsley and they sent them direct to Marshall & Ilsley.

195 G. W. VAN DUSEN, a witness called and sworn on the part of the defendant, testified as follows:

Direct examination by Judge WILSON:

Question. What is your name, age, and place of residence?

A. George W. Van Dusen; Rochester, Minnesota; age, fifty-eight.

Q. Are you the person who was the president of the Plainview Railway Co. prior to the election of Mr. Keep to that place?

A. I am.

Q. You are the George W. Van Dusen referred to and one of the parties in the contract entered into between George W. Van Dusen and the Chicago & Northwestern Railway Co. in May, 1878, with reference to the purchase of the franchises and properties of the Plainview Railway Co.?

A. Yes, sir.

Q. Was the Plainview railway built while you were the president of the company?

A. It was.

Q. Were you or were you not induced and influenced to build the line of that road by the promises or agreements to issue the bonds of those towns?

Objected to as irrelevant and immaterial.

A. Yes, sir.

Q. Were you induced and influenced to build it and did you build it relying upon obtaining those bonds?

Objected to as irrelevant and immaterial.

A. I promised to build the road on the condition that they would give me the bonds. As far as building the road is concerned, it was built by the Chicago & Northwestern Railway Company. I did not build the road.

Q. But, so far as you had anything to do with it, were you induced and influenced in your action — securing the building of that road by the promise of those bonds?

Objected to as irrelevant and immaterial.

A. I was.

Q. So far as you know, were the Chicago & Northwestern Railway Company induced and influenced to furnish money to build that road by the promise of those bonds and relying upon those bonds?

Objected to as incompetent, irrelevant, and immaterial.

A. Yes, sir; I think the promise of the issue of the bonds was the inducement that made them take hold of it.

196 Q. After this contract before referred to, entered into between you and the Chicago & Northwestern Railway Company May 10, 1878, did you act for the Chicago & Northwestern Railway Company?

A. I did.

Q. Did Mr. C. T. Benedict act for you after that time in pursuance of this contract?

A. Yes, sir.

Q. In everything he did thereafter or theretofore with referece

to this road or to obtaining the bonds for this road was he acting simply as your employé and under your direction?

A. Yes, sir.

Q. When those bonds of the towns of Plainview and Elgin were obtained and forwarded to Chicago were they so obtained and forwarded in pursuance of the contract with the Chicago & Northwestern Railway Co.?

A. Yes, sir.

Q. As you then understood it and as you now understand it did the Chicago & Northwestern Railway Company obtain those bonds on account of moneys they had furnished for the purpose of aiding in the building of that road?

Objected to as irrelevant and immaterial.

A. The bargain I made with them gave them the road and the bonds and everything else; I had no rights.

Q. Was there any object or purpose in the sending of those bonds to them, at the time they were sent to them, to prevent the town of Plainview or the town — Elgin having any defense against those bonds?

Objected to as irrelevant and immaterial.

A. No, sir; not that I know of.

Q. Was it or was it not true that that was done simply, as you understood, in pursuance of the contract entered into between you and the Chicago & Northwestern Railway Company and in pursuance of the rights of that company on account of money furnished?

A. Yes, sir.

Q. On your part was there any desire or intention to prevent those towns or either of them from having any defense whatever against those bonds?

Objected to as irrelevant and immaterial.

A. I never had any such idea.

Q. So far as you know did any officer of the Chicago & Northwestern railway have any such idea?

Objected to as irrelevant and immaterial.

A. Not so far as I know.

Q. Up to the time that road was built and completed was there, as far as you know, any objection made by the people of those towns or by any of the people of those towns to the legality of those bonds or of their issue?

197 Objected to as irrelevant and immaterial.

A. No, sir.

Q. Were you or were you not present when Mr. Thomas, who has just been examined here as a witness, with Mr. Ilsley, of Milwaukee, and another gentleman, called on Richard Jones at Rochester to inquire about those bonds?

A. I was present at an interview of Mr. Jones with Mr. Marshall

or Mr. Ilsley—I don't remember which; it was one of the firm—and some gentleman from Madison, who had a conversation with Mr. Jones in regard to the manner of issuing the bonds of the different towns.

Q. Was Mr. Thomas present at that conversation?

A. He was.

Q. State whether at that conversation the mode of procedure followed in obtaining those bonds was referred to or spoken of.

A. My recollection is that that was the subject discussed, and the manner of proceeding was talked about. Just the conversation that occurred I cannot remember, but that was the subject of the conversation with Mr. Jones, mainly.

Q. And did that conversation refer to the bonds of Plainview and Elgin as well as other towns?

A. I think it did.

Cross-examination by F. B. KELLOGG:

Question. You were president of the Plainview Railway Company from the time of its organization down to some time about the first of June, 1879, were you not?

A. I should think that was about the time.

Q. After the delivery of those bonds?

A. Yes, sir.

Q. The contract you spoke of is that made between you and the Chicago & Northwestern Railway Company, dated May 10, 1878, I suppose?

A. Yes, sir.

Q. In making the contract you acted, did you not, for the Plainview Railway Company?

A. Yes, sir; I acted for the corporation, the Plainview Railway Company.

Q. In taking all the steps preliminary to the issue of the bonds, the making of the petitions, and doing all that was done in the towns of Plainview and Elgin by the railway company you acted for the Plainview Railway Company, did you not?

A. I acted as an officer of the Plainview Railway Company, although I considered myself simply a hired man for the
198 Chicago & Northwestern Railway Company, and carried out that work for them under the laws of our State as an officer of the Plainview Railway Company.

Q. I am speaking of the time prior to the making of this contract?

A. Prior to the making of this contract, of course I acted for the Plainview Railway Company.

Q. And in taking all the steps preliminary to the issuance of the bonds you acted as president for the Plainview Railway Company, did you not?

A. Up to the time of making this contract; yes, sir.

Q. Were you an officer of the Chicago & Northwestern Railway Company?

A. No, sir.

Q. During any of this time?

A. No, sir; I will qualify that just a little, however. You use the term "officer." I will say that I considered myself an employé of the Chicago & Northwestern Railway Company.

Q. Were you an elected officer in any way of the Chicago & Northwestern Railway Company?

A. No, sir.

Q. In carrying out the terms of this contract that you made with the Chicago & Northwestern Railway Company you represented the Plainview Railway Company, did you not?

A. Yes, sir.

Q. In receiving those bonds of the towns of Plainview and Elgin you acted for and on behalf of the Plainview Railway Company, did you not?

A. I suppose it would be considered so in law.

Q. You considered and understood at that time that the bonds of the towns of Plainview and Elgin were issued and delivered, as agreed, to the Plainview Railway Co.?

Objected to as incompetent.

A. Yes, sir.

Q. Did Mr. Benedict represent you and the Plainview Railway Company?

A. He represented me as president of the Plainview Railway Company.

Q. Then the bonds of the towns of Plainview and Elgin, as they agreed to do in their resolutions and petitions, were delivered to the Plainview Railway Company, were they not?

A. Yes, sir.

Q. Did you and Mr. Benedict take the bonds of either town down to Chicago?

A. I think Mr. Benedict procured the bonds of the town of Elgin and the town of Viola and took them down himself and kept
199 possession of them until he delivered them to Mr. Kirkman. I went to Chicago at the same time with him, but I don't think I was present at the delivery of the bonds. I think he delivered them himself.

Q. In speaking of being an employé of the Chicago & Northwestern Railway Company you mean only your employment in carrying out this contract, do you not?

A. Yes, sir.

Q. You were not an employé of the Chicago & Northwestern Railway Company in any other respect; you were not an agent of the Chicago & Northwestern Railway Company?

A. No, sir.

Q. Then what you did in receiving those bonds you did as president of the Plainview Railway Company?

A. I did it in that capacity.

Q. And in carrying out this contract you did the same as president of the Plainview Railway Company?

A. Yes, sir.

Q. Did you understand by this contract with you that when the road was completed and you had performed on your part all that was to be performed you were to get those bonds and turn them over to the Chicago & Northwestern Railway Company?

A. Yes, sir; if I got the bonds I was to turn them over to the Chicago & Northwestern Railway Co.

Q. And you did get the bonds and did turn them over to the Chicago & Northwestern Railway Co.?

A. Yes, sir.

Q. And in doing this you acted as president of the Plainview Railway Co.?

A. Yes, sir.

Q. And acted for the Plainview Railway Co., did you not?

A. Well, I could hardly swear on that point, as I was really acting for the Chicago & Northwestern Railway Co., and if they had ordered me to do anything else I should have felt bound to follow their instructions. I supposed that by my being an officer of the Plainview Railway Co. was a mere matter of form to carry out the law under which we were building the road, and that the real thing itself was that I was acting as a servant of the Chicago & Northwestern Railway Co.

Q. You mean the Chicago & Northwestern Railway Co., pursuant to that contract, was furnishing the money and backing it?

A. Yes, sir.

Q. But the title of the road was the Plainview Railway Co.?

A. Yes, sir; they could not have it any other way.

200 Redirect examination by Judge WILSON:

Question. Is not this, then, the understanding that you had and have, viz., that, as a matter of form, you acted for and represented the Plainview Railway Co., but, as a matter of fact, the Chicago & Northwestern Railway Co., in pursuance of a contract and the advancing of the money to build that line of road, were entitled to receive and take those bonds?

A. Yes, sir.

Q. And, according to your and their understanding, is it not true that there was no right on the part of the Plainview Railway Co. or any one else to divert from the Chicago & Northwestern Railway Co. those bonds after they had so advanced the money to build the road?

A. No; I considered the bonds theirs and no one else's.

Q. According to your understanding, and, so far as you know, according to their understanding, they advanced the money to build the road with this distinct view, viz., they would get those bonds?

Objected to as irrelevant and immaterial.

A. My understanding of the contract I made with them was that as president of the Plainview Railway Company. I turned over for a consideration all the rights, title, and interest I had in the Plainview Railway Company, and they took the franchises and whatever I had and agreed to carry out the contract I had made with the

towns, and took all the bonds that I might get and all the aid I would get for so doing.

Q. They did furnish the money to build the road, did they not?

Objected to as irrelevant and immaterial.

A. Yes, sir.

Q. And the road was built in pursuance of the contract with that money so furnished, was it not?

Objected to as irrelevant and immaterial.

A. Yes, sir.

Q. And those bonds were, in pursuance of that money and the conditions aforesaid and the considerations aforesaid, delivered over to them?

Objected to as irrelevant and immaterial.

A. Yes, sir.

Q. And the purpose in sending them those bonds was solely to comply with what you understood to be your duty and contract, without any other purpose whatever, was it not?

Objected to as irrelevant and immaterial.

A. Yes, sir.

201 Q. Did the Plainview Railway Company receive any consideration whatever for the delivery of those bonds except the money so advanced and the building of the road as aforesaid?

A. The only consideration that I received as president of the Plainview Railway Company was as stated in the contract between the Chicago & Northwestern Railway Company and myself; there was no further pay than that.

Q. And, as far as you know, did the Plainview Railway Company receive from the Chicago & Northwestern Railway Company one dollar for those bonds except the money which had been advanced before they were issued to aid in the building of the line of road?

A. No, sir.

Recross-examination by F. B. KELLOGG:

Question. Then it was your understanding that under this contract when the Plainview Railway Company got those bonds from the towns it was your duty, as president of the Plainview Railway Company, to turn them over to the Chicago & Northwestern Railway Company for what they had done pursuant to that contract?

A. It was my understanding that when those bonds were obtained, according to the contract I had made with the Chicago & Northwestern Railway Company, they belonged to them. They had fulfilled their part of the contract and that finished my part of the contract.

Q. But unless the Plainview Railway Company got them it was not your understanding that the Chicago & Northwestern Railway Company were entitled to them?

A. No, sir; as I understand the contract that I made with the Chicago & Northwestern Railway Company it was that I did not

guarantee to get those bonds, but, if I did get them, they belonged to them.

202 It is hereby stipulated as to this deposition and the deposition of Mr. T. Thomas, just taken, that the same, having been taken in short-hand, shall be reduced to copy in long hand and sent to each of said witnesses for signature, and, when so signed, shall be returned and certified to by O. B. Gould, the notary who administered the oath to said witnesses, and that no objection shall be taken by either party to the mode of taking, signing, certifying, or returning the said depositions or either of them, and that, when so signed and certified, they shall be sent to file with the clerk of the district court of Wabasha county, and shall not be subject to any objection whatever except as stated in said depositions.

203 EXHIBIT "4."

STATE OF MINNESOTA:

District Court, County of Wabasha, Third Judicial District.

THE TOWN OF PLAINVIEW, Plaintiff,
against
THE WINONA & ST. PETER RAILROAD CO., Def't.

The above-entitled action came on for trial upon the pleadings and the evidence at a regular term of said court held in the city of Wabasha, in said county, on the 25th day of June, A. D., 1885, the Hon. L. W. Collins, district judge, presiding, and was tried by the court, trial by jury having been duly waived by stipulation, and the premises being considered, and the court, being now sufficiently advised of and concerning the same, finds the following conclusions of facts:

That the plaintiff is, and for more than ten years last past has been, a town and municipal corporation duly created and organized under and by virtue of the laws of the State of Minnesota; that during the years 1878 and 1879 one T. G. Bolton was the duly elected and qualified chairman of the board of supervisors of said town, and C. E. Daniels and F. Struble were the duly elected and qualified supervisors of said town, and A. B. W. Norton was the duly elected and qualified town clerk thereof; that the
204 Plainview Railroad Company during all the times hereinafter stated was a corporation duly created and organized under and by virtue of the laws of the State of Minnesota, with power to build a certain line of railroad from a point of junction with the Winona & St. Peter railroad in the county of Olmsted east of the west line of the town of Eyota, in said county of Olmsted, to a point within the corporate limits of the village of Plainview as the same existed December 31st, 1877.

That the Winona & St. Peter Railroad Company was during all the times herein stated and now is a corporation duly created and organized under and by virtue of the laws of the State of Minne-

sota, and that on January 31st, A. D. 1878, said Plainview Railroad Company made and delivered to the town clerk of the town of Plainview a proposition in writing, signed by the president and secretary of said company, containing all the statements and specifications required by section four (4), chapter 106, of the General Laws of the State of Minnesota for the year 1877, and stating the amount of bonds of the said town desired to be $50,000, and said town clerk immediately endorsed on said proposition the date of filing, and the same was duly transcribed in his records, and that Exhibit "A" attached to the complaint is a true copy of said proposition; that thereafter and on or about the 31st day of January, A. D. 1878, said Plainview Railroad Company posted up in three public places in said town notice that after a certain day, to wit, after February 6th, 1878, a petition to the supervisors of said town, appended to a copy of said proposition, Exhibit "A," would be presented to the resident tax-payers of the said town of Plainview, asking the said supervisors to agree to said proposition filed with said town clerk as aforesaid, a true copy of which notice is attached to the complaint herein, marked Exhibit "B," and to which notice was appended a copy of said Exhibit "A," which said notice, with said proposition, Exhibit "A," was published in the newspapers printed and published in said town, as provided by said act, and that said notice was the only notice ever given in relation to said matter.

That thereafter and within three months after the filing of said proposition with said town clerk, to wit, on the 30th day of March, A. D. 1878, said railroad company delivered to said town clerk certain petitions, four in number, in form required by section seven (7) of said chapter 106 of the General Laws of 1877; which said several petitions were in the following form, except as to the names appended, which are omitted, viz:

"*Petition.*

"To the town board of supervisors of the town of Plainview, in the county of Wabasha and State of Minnesota:

"We whose names are hereto subscribed, being residents of said town and who are assessed for taxes upon real and personal estate in said town, as shown by the last assessment-roll of said town, respectfully ask you, as the proper authorities of said town, to agree to the proposition of the Plainview Railroad Company to which this petition is appended.

"Dated this 7th day of February, A. D. 1878."

To each of said petitions was attached a copy of the proposition made by the Plainview Railroad Company, being Exhibit "A" attached to the complaint; that said petitions were filed with said town clerk, and bore the signatures of a majority of the persons residing in said town of Plainview who were assessed for taxes upon real and personal estate in said town, as shown by the last assessment-roll thereof, which signatures were verified by the affidavits of the persons witnessing such signatures; that said petitions and signa-

tures thereto were made and obtained under and pursuant to the provisions of section 7 of the aforesaid act of 1877 and not otherwise; that said petitions so signed as aforesaid had appended thereto copies of said proposition, and were filed in the office of the town clerk of the town of Plainview on the 30th day of March, A. D. 1878, and that the same were the only petitions ever presented to said town clerk and the only ones ever made touching said matter or asking the authorities of said town to agree to the proposition of the said Plainview Railroad Company, and that said petitions and section 7 of said act of 1877 and the foregoing premises constituted the only authority had or claimed for the issue of the bonds in controversy in this action; that no election was ever held in said town to authorize the supervisors to agree to said proposition or to issue any bonds of said town or in relation to said matter in any manner whatever, and the parties to this action did at the trial stipulate as a fact, and it is hereby found to be a fact, that the terms and provisions of the statute under which said bonds were issued were in all respects performed and complied with by the said Plainview Railroad Company, and that the proposition submitted under said statute was in all respects complied with, and that said Plainview Railroad Company had, prior to the issuance of said bonds, earned and become entitled to the same, if the law authorizing their issue was constitutional; that there was no election or vote of the electors of said town authorizing the issue of said bonds or any vote by election upon the proposition therefor; that the proceedings had were by and in pursuance of a petition of a majority of the tax-payers of said town, as provided in said statute.

206 It is further found as facts that thereafter and on March 30th, A. D. 1878, said board of supervisors of said town of Plainview, pretending and claiming to act and acting under and by virtue of the foregoing petitions, proposition, proceedings, and premises and without any other authority or right whatever, did adopt and place on file in the office of the said town clerk of the town of Plainview a certain resolution, of which a true copy is annexed to the complaint, except that the word "July" should be "February," and marked Exhibit "C;" that said supervisors had no other authority to pass said resolution or to bind the town of Plainview or to waive the issue of stock to said town save and except as above stated; that no proceedings except as herein set forth were ever taken by the electors of said town or any proceedings or acts whatever to authorize the passage of said resolution except as herein stated; that said Plainview Railroad Company constructed its railroad and had its cars running thereon and performed the several acts on its part as in said proposition stated, except that the railroad company never issued to the town of Plainview any stock of the said company and never tendered or offered to issue the same.

That after the proceedings as aforesaid and before issuing, making, or delivering of any of the bonds and coupons in controversy an action was duly brought and instituted in the district court of the State of Minnesota in and for the county of Wabasha, in which action one George W. Harrington, a resident, citizen, and tax-payer

of said town of Plainview, was plaintiff and said supervisors of said town and said chairman of the board of supervisors of said town and said town clerk, as such officers, and said town of Plainview and said Plainview Railroad Company were defendants, upon the matters and facts hereinbefore found and upon sufficient allegations of the same, the object and purpose of which action was to have said town officers and said town perpetually enjoined from issuing and said Plainview Railroad Company from receiving or obtaining any of said bonds or coupons hereinafter set forth, on the ground that section seven of chapter 106 of the Laws of 1877, being the act under and pursuant to which all of said proceedings were had, was and is unconstitutional and said proceedings thereunder wholly void, which said matters were fully set forth in the complaint in said action, and that the defendants answered said complaint.

That said court had and duly obtained jurisdiction of all the parties to said action and of the subject-matter thereof, and that on the 11th day of November, A. D. 1878, it granted a preliminary injunction in said suit, commanding and enjoining said supervisors and
207 said defendants to desist from issuing or delivering to the Plainview Railroad Company or to any one for it any bonds of said town of Plainview and enjoining said Plainview Railroad Company from receiving the same, which injunction was then duly served upon all of said defendants; that said action was brought on for trial before the district court, in chambers, at Winona, on the 27th day of January, A. D. 1879, and on the 6th day of February, A. D. 1879, said court made and filed its decision therein, by which it found and decided that the plaintiff in said action was not entitled to the relief asked for, and that the defendants were entitled to judgment dismissing the action; that on the 8th day of February, 1879, an order was made, on the application of the plaintiff's attorney in said action, staying proceedings therein, as follows (after the title of the action)

"On application of the plaintiff herein it is hereby ordered that all proceedings herein upon or pursuant to the findings and decision of the court rendered herein be, and the same are hereby, stayed for the period of twenty (20) days from this date, that plaintiff may prepare a case on bill of exceptions herein.

"Dated February 8th, 1879."

WILLIAM MITCHELL,
Judge of the District Court.

And on February 26th, 1879, a further stay of fifteen days was granted to said plaintiff.

That on the 11th day of March, 1879, the court made an order denying a new trial, said motion having been made upon the ground that the decision of the court is contrary to law; and on the same day a bond for appeal was given by said Harrington in said action in due form, with two sureties, in the sum of $300, reciting that said Harrington had appealed to the supreme court of the State of Minnesota from said order, conditioned to be void if said Harrington should well and truly pay all costs and charges which might be awarded against him on such appeal, not exceeding the penalty of

said bond; and on the 12th day of May, 1879, said Harrington gave due notice of appeal to said supreme court from said order, and on March 15th, 1879, said district court rendered a judgment that said plaintiff's action be dismissed upon the merits and the preliminary injunction dissolved.

That on the 12th day of September, 1879, the plaintiff in said action gave due notice of appeal to said supreme court from the aforesaid judgment, and duly gave a bond for costs on such appeal in the sum of $250, as provided by law; that all proceedings requisite to appeal to said supreme court from said order and judgment were duly taken by said Harrington, and transcripts of the records in
208 said case were by him duly filed in said supreme court and said supreme court duly had and obtained jurisdiction in said premises; that the same was duly heard and determined by said supreme court, and said supreme court did, on or about the 6th day of October, A. D. 1880, duly determine, adjudge, and decree that said section seven of the aforesaid act of 1877 was and is unconstitutional and void, and that all of said proceedings are and were invalid, and that neither said town officers or said town of Plainview has or had any power or authority to issue said bonds or coupons or any of them or said Plainview Railroad Company to receive them, and reversed the aforesaid judgment of said district court and duly entered and recorded its judgment of reversal to that effect, which judgment of said supreme court has ever since remained and now is of full force and effect.

That on the 18th day of March, A. D. 1879, the said board of supervisors of the said town, at the instance and request of said railroad company, passed and placed on file in the office of the town clerk of said town a certain resolution, a true copy of which is annexed to the complaint herein and marked Exhibit "D;" that no authority had ever been given by the electors of said town or by said town or by any proceedings or act to authorize said supervisors to pass such resolution, except as stated in these findings; that said supervisors and said railroad company well knew when the same was passed and when all the other proceedings were taken herein that no election had ever been held in the premises; that, pending said action brought by said Harrington and on the 19th day of March, A. D. 1879, said T. G. Bolton, chairman of said board of supervisors, and A. B. W. Norton, said town clerk of said town, pretending to act under and by virtue of the foregoing proceedings according to the resolution and said section seven of said act of 1877, and without any other authority, executed, issued, and delivered to the Plainview Railroad Company certain negotiable bonds and interest coupons thereto attached, which said bonds were one hundred in number, purporting to be bonds of the said town of Plainview and were numbered from one to one hundred, consecutively, and each of the same on its face purported to be the bond of the town of Plainview; that all of the same were payable to the Plainview Railroad Company or to bearer and were for $500 each, amounting in the whole to the sum of fifty thousand dollars ($50,000); that all of the said bonds are of the same tenor, and that a copy of one of them is annexed

to the complaint and marked Exhibit "E;" that said bonds were dated January 1st, 1879, and were payable in twenty years after the date thereof, and bear interest at seven per cent. per annum,
209 payable annually, according to the conditions of twenty certain interest coupons attached to each of said bonds and numbered corresponding to the number of said bond, the first being payable January 1st, 1880, and the others payable on January the first of each year thereafter for twenty years, and that a copy of one of said coupons, which are all of the same tenor except as to the number and date when payable, is attached to the complaint herein and marked Exhibit "F," and all of which were signed by said Bolton and Norton as such officers, were attached to said bonds, and were delivered to said Plainview Railroad Company therewith; that said officers had not been authorized by said town or by any vote of the electors or legal voters thereof or by any of the laws of the State of Minnesota to issue said bonds or coupons or by any act or proceedings whatever, except the acts and proceedings herein set forth, all of which they well knew at said time, and that said bonds and coupons were executed and delivered by said town to said railroad company without any consideration whatever, and that said railroad company received the same well knowing all the premises herein set forth.

That said Plainview Railroad Company, well knowing all the premises and intending to deprive said town of any defence to said bonds and coupons as against any *bona fide* holders for value thereof, did, in the fore part of July, A. D. 1879, sell and transfer and deliver all of said bonds and coupons to the Chicago & Northwestern Railway Company, a corporation created and existing by laws of the State of Wisconsin and the State of Illinois, for the sum of $50,000, which sum had been previously advanced by said Chicago & Northwestern Railway Company to said Plainview Railroad Company for the construction of the railroad of the said latter company; that thereafter, on or about July the 10th, A. D. 1879, said Chicago & Northwestern Railway Company sold and delivered all of said bonds and coupons to one T. Thomas, of Baraboo, Wisconsin, a citizen of that State, for the sum of eighty (80) per cent. of the par thereof; that immediately thereafter, and in the month of July, 1879, said Thomas sold and delivered said bonds to Samuel Marshall and Charles F. Illsley, of Milwaukee, in the State of Wisconsin, and citizens of said State, for the sum of eighty-seven (87) per cent. of the par thereof; that in making said sale to Marshall & Illsley said Thomas sold and delivered to them and they paid him for all of said bonds, but said Thomas reserved the right to take back from them a few thousand dollars, about $5,000, which he shortly afterwards did, and sold a part of the amount which he so took back to the trustee of some minor heirs, to wit, to one
210 Charles H. Williams, of Cincinnati, Ohio, and the rest of the bonds which he so took back he sold, some to the said Marshall & Illsley and some to one Fitch, of the National Exchange Bank of Milwaukee.

That said Chicago & Northwestern Railway Company and said

Thomas had due notice and knowledge of all the facts and circumstances preceding and attending the issue and delivery of said bonds to said Plainview Railroad Company, except as to the pendency of the proceedings of the suit so as aforesaid brought by said Harrington, and that Marshall & Illsley and said Williams and said Fitch had no knowledge when they purchased said bonds of any of the said proceedings nor of the existence or pendency of said suit, but bought and paid for said bonds without such knowledge or notice and without any knowledge or notice of any defence thereto, except as such appears upon the face of said bonds, and became and were thereby *bona fide* purchasers and holders for value thereof.

That thereafter, and on or about the 29th day of January, A. D. 1881, said town having refused to pay the interest coupons then due, said Marshall & Illsley, who were citizens of the State of Wisconsin, commenced an action in the circuit court of the United States for the district of Minnesota against the town of Plainview, and said court then and there obtained and had jurisdiction of the said action and of the parties thereto; that said suit was brought to recover the amount of interest due upon forty-seven coupons of said bonds falling due January 1st, 1881, and was brought upon said forty-seven coupons; that said Marshall & Illsley in their complaint in said action alleged that they were the owners of all of said bonds and coupons annexed, except the coupons which matured January 1st, 1880, said bonds being forty-seven in number, and that a copy of one of said bonds and of all the coupons sued on was attached to said complaint; that the town of Plainview in said suit defended said action by answer, denying that said bonds or coupons or any of them were ever made, executed, or delivered by the defendant or by its authority, or that the chairman of its board of supervisors or its town clerk was ever lawfully authorized or empowered to make, execute, or deliver the same. Said answer alleged that each and all of said bonds and coupons were made, executed, and delivered by said chairman and said clerk under and pursuant to the pretended authority and provisions of section seven, chapter 106 of the General Laws of the State of Minnesota for the year A. D. 1877 as aforesaid, and in no other manner and by no other authority whatever. Said answer also set up the proceedings prior to and attending the issue of said bonds had by said town, its officers, and the Plain-
211 view Railroad Company in relation thereto substantially as set up in the complaint in this case, and had attached thereto copies of the notice, proposition, and petition set up in the complaint in this action. Said answer also set up the bringing of said suit by George W. Harrington and the proceedings had in said suit in the district court and in the supreme court and the orders and judgment therein substantially as set up in the complaint herein and as hereinbefore found. The said Marshall & Illsley in their reply to the answer of the town of Plainview in said action alleged that they purchased said bonds and coupons on the 8th of July, 1879, for a valuable consideration and without any notice in fact of any of the matters relied on in defence of said action except such as appears on the face of said bonds from the recital therein contained.

That said suit brought by said Marshall & Illsley duly came on for trial before said United States circuit court at the June, 1881, term thereof, and on the 11th day of October, 1881, the said court, a jury trial having been waived, found as facts in said action that the bonds and coupons involved in such action were purchased by the said Marshall & Illsley July 9th, 1879, for value and without notice of any of the matters relied on as defence except such as appear on the face of said bonds; that the amount due on said bonds and coupons sued on in said action was $1,697.66, and did adjudge and enter its judgment that said Marshall & Illsley do have and recover against said town of Plainview said sum, and also the sum of $47.32 costs and disbursements—in all, $1,746.98—and have execution therefor, and did adjudge that in the hands of Marshall & Illsley, such innocent purchasers, said bonds and coupons are valid and enforceable obligations against said town of Plainview. It is further found as facts that said town of Plainview did, before the commencement of this action and on or about the 17th day of March, A. D. 1883, pay said judgment in full; that said town of Plainview removed said judgment of the United States — court to the Supreme Court of the United States by writ of error, but that said court last named dismissed the same, before this action was brought, on the ground that the amount in controversy upon the face of such record was less than $5,000, and that after the institution of their first suit in said United States circuit court said Marshall & Illsley duly brought in said court, which then and there had obtained jurisdiction thereof and of the parties, five other suits against the said town of Plainview to recover upon certain other coupons of said bonds held and owned by them and the interest falling due, which said coupons had become due year by year
212 according to the terms thereof, to wit: One suit which was commenced November 21st, 1881; another suit which was commenced March 2d, 1882; another suit which was commenced May 11th, 1883; another suit which was commenced September 17th, 1883, and another suit which was commenced January 5th, 1884; and that on the two suits brought November 21st, 1881, and March 2d, 1882, the town of Plainview interposed substantially the same answer as to the first suit brought against it, but to the other suits it made no answer, for the reason it was advised *upon that* that the question of its liability as to a *bona fide* holder of said bonds and coupons had become *res adjudicata* in that court; that said United States circuit court so proceeded in said actions and in each of them that judgment was rendered in each of said cases in favor of Marshall & Illsley and against the town of Plainview, as follows: In the action commenced November 1st, 1881, for $1,717.31; in the action commenced March 2d, 1882, for $4,154.08; in the action commenced May 11th, 1883, for $2,595.57; in the action commenced September 17th, 1873, for $771.15, and in the action commenced January 5th, 1884, for $3,906.22; that of such judgments last named said town of Plainview has paid as follows: On June 21st, 1884, it paid on said judgment in the suit commenced March 2d, 1882, $4,154.08; on the 1st of April, 1884, it paid on the judgment in the

suit commenced November 1st, 1881, $1,717.31; on the 9th of April, 1885, it paid on the judgment in the suit commenced May 11th, 1883, $2,595.57, and it will be compelled to pay the aforesaid judgments which as yet remain unpaid.

That prior to the commencement of this present action said Marshall & Illsley sold and transferred to various persons who were *bona fide* purchasers thereof for value, without notice or knowledge of any of the matters which are claimed to invalidate said bonds, all of said bonds and coupons ever held by them, except such coupons as they had obtained judgments upon, and that said bonds and coupons so held by them are now held and owned by such *bona fide* purchasers or their assigns, and are and will be in the hands of such transferees or their assigns valid and subsisting obligations against this plaintiff, which the plaintiff will be compelled to pay in full, principal and interest.

That in the year 1881 the State of Minnesota duly enacted a certain statute entitled "An act to authorize the Winona & St. Peter Railroad Company to purchase the stock and to purchase or lease the property and franchises of the Plainview Railway Company," which said act is as follows(after the title):

"Be it enacted by the Legislature of the State of Minnesota:

213 SECTION 1. The Winona & Saint Peter Railroad Company is hereby authorized to purchase the stock or to purchase or lease the property and franchises of the Plainview Railway Company, and said last-named company — hereby authorized to sell and convey or to lease its property and franchises to the said first-named company upon such terms as may be agreed upon by the respective boards of directors of said companies, so as to make the property and franchises of the last-named company a part of the property and franchises of said Winona and Saint Peter Railroad Company to be used and operated by it under its charter:

Provided, That any such purchase of the property or franchises of the Plainview Railway Company shall be made and all such property held by said Winona and Saint Peter Railroad Company subject to all demands, claims, and rights of action against said Plainview Railway Company arising or growing out of the latter company having heretofore obtained and disposed of certain bonds and coupons purporting to have been issued by the towns of Plainview, Elgin, and Viola to said Plainview Railway Company, and in taking such transfer under this act said purchasing company shall assume all claims and demands against said Plainview Railway Company to the extent and value only of the property and franchises so transferred.

SEC. 2. The Winona & Saint Peter Railroad Company is hereby authorized to issue its capital stock to an amount necessary to make and complete the purchase aforesaid.

SEC. 3. This act shall take effect and be in force from and after its passage.

Approved March 3, 1881.

Which act after its passage was duly accepted and consented to by the Winona & St. Peter Railroad Company.

That the bonds and coupons in this action in question are the same bonds and coupons intended by said statute, and that the matters and facts recited in said statute are true; that on the 11th day of May, 1881, said Winona & St. Peter Railroad Company, acting solely under the provisions of said statute, purchased all the property and franchises of the Plainview Railroad Company referred to in said statute and took a transfer and deed thereof from said Plainview Railroad Company, and I find as a fact that it has been stipulated in this action and in a similar action brought by the town of Elgin and tried with this action that no issue shall be raised as to the value of the property and franchises of the Plainview
214 Railroad Company so transferred to the Winona & St. Peter Railroad Company, but that if the plaintiff in this suit recovers a judgment against the defendant no question shall be made by the defendant, but that the property conveyed and deeded to the defendant by the said Plainview Railroad Company was and is equal in value to the judgment so obtained, and that for the purposes of this action the value of said property was equal to the judgment obtained in this action, and I find as a fact that the value of such property and franchises so transferred by the Plainview Railroad Company to the Winona & St. Peter Railroad Company was at the time of such transfer in fact the sum of two hundred and twenty-five thousand dollars ($225,000).

That as part and parcel of such sale and transfer and to evidence the carrying out of the same said Plainview Railroad Company did, on the 11th day of May, A. D. 1881, execute to the Winona & St. Peter Railroad Company its deed of conveyance and transfer, of which a true copy is as follows, and which deed was duly recorded in the county of Olmsted, in the State of Minnesota (through which county said Winona & St. Peter Railroad Company operates its line of railroad), on the 6th day of April, A. D. 1885, in Book 53 of Deeds, page 403, and through which county a part of the line of the said Plainview Railroad Company runs:

Plainview Railroad Company to Winona & St. Peter Railroad Company.

This indenture, made this eleventh day of May, A. D. 1881, by and between the Plainview Railroad Company, a corporation of the State of Minnesota, party of the first part, and the Winona & St. Peter Railroad Company, a corporation of said State, party of the second part, witnesseth: That said party of the first part, for and in consideration of the sum of two hundred and twenty-five thousand dollars ($225,000) to it paid by said party of the second part, the receipt of which is hereby acknowledged, and by virtue of the power and authority conferred upon the parties hereto by an act of the Legislature of the said State entitled "An act to authorize the Winona & St. Peter Railroad Company to purchase the stock and to purchase or lease the property and franchises of

the Plainview Railroad Company," approved March 3d, 1881, and with the unanimous consent of the stockholders of both parties hereto, hath granted, bargained, sold, transferred, and conveyed, and by these presents doth grant, bargain, sell, transfer, and convey, to said party of the second part and to its successors forever all and singular the railroad of said party of the first part, beginning at a point
215 within the corporate limits of the village of Plainview, in the county of Wabasha, in the State of Minnesota, to a junction with the railroad of the Winona & St. Peter Railroad Company in the county of Olmsted, in the State of Minnesota, a distance of about sixteen miles, more or less, with all and singular the franchises, including the franchise to be a corporation, and all rails and switches, turnouts, warehouses, station buildings, elevators, water tanks, turntables, side track, tools, ties, embankments, superstructure, and all property of every kind and description, real, personal, or mixed, and all choses in action, moneys, debts, claims, or demands of every kind belonging to said party of the first part or in any manner appurtenant to the said railroad or any part thereof, hereby conveying all the effects and property of said party of the first part, wherever situate or being, so that said party of the second part may and shall own, possess, and enjoy the same to the same extent the same were owned, possessed, and enjoyed by said party of the first part before the execution hereof:

To have and to hold the same and every part and parcel thereof to the said party of the second part and its successors forever.

In witness whereof the said party of the first part has caused these presents to be signed by its president, sealed with its corporate seal, and the same attested by its secretary the day and year first above written.

[Official Seal Plainview Railroad Company.]

PLAINVIEW RAILROAD COMPANY,
By ALBERT KEEP, *President.*
Attest: J. B. REDFIELD, *Secretary.*

Signed, sealed, and delivered in presence of—
WILLIAM A. ALLEN.
M. M. KIRKMAN.

STATE OF MINNESOTA, } ss:
Winona County, }

Be it remembered that on this 11th day of May, A. D. eighteen hundred and eighty-one, before me, the subscriber, a notary public in and for said Winona county, in the State of Minnesota, personally appeared Albert Keep, known to me to be the president of the Plainview Railroad Company, and Joseph B. Redfield, to me known to be the secretary of the said railroad company, who, as such president and secretary, executed the foregoing instrument, and they severally acknowledged to me that they executed the foregoing instrument as president and secretary of said railroad company and caused the corporate seal of the said company to be affixed thereto, pursuant to authority given by the board of directors of said com-

pany, as their free act and deed of the said Plainview Railroad Company for the purposes therein specified.

216 Witness my hand and official seal the day and year aforesaid.

[Notarial Seal Winona County, Minn.]

W. A. ALLEN,
Notary Public, Winona County, Minn.

That immediately after the execution of such deed the Winona & St. Peter Railroad Company took possession of all the property and franchises conveyed and transferred or intended to be conveyed and transferred to it by said deed and has ever since owned, used, and enjoyed the same; that said purchase was made and deed so executed and received under and by virtue of the said statute last named and the powers therein granted, and that the Winona & St. Peter Railroad Company, in making such purchase and taking such deed and transfer and as a part of the consideration thereof, assumed all claims, demands, and rights of action against the Plainview Railroad Company as in said act provided, and particularly assumed and became liable for all claims, demands, or rights of action set forth in the complaint in this action, and agreed to pay the same.

Save as aforesaid, the allegations in the pleadings not admitted therein are not established by the evidence, and are therefore found to be not true. It is found as conclusions of law that the plaintiff is entitled to have and recover of the defendant the sum of fifty thousand dollars ($50,000) and interest thereon from the first day of January, A. D. 1879, at seven (7) per cent. per annum, amounting at this date to seventy-four thousand four hundred and fifty-one and thirty-one hundredths dollars ($74,451.31), together with the costs and disbursements of this action.

In case entry of judgment is delayed after this date there will be added to the above amount interest on the said sum of fifty thousand dollars ($50,000) from this date.

Let judgment be entered accordingly.

Dated this 26th day of December, A. D. 1885.

By the court:

L. W. COLLINS,
District Judge.

217 The above "case" having been by me examined and found true and conformable to the facts, I do hereby settle, approve, and sign and seal the same.

Dated May 19th, 1886.

L. W. COLLINS, [SEAL.]
District Judge.

Filed Aug. 9, 1886.

CHAS. J. STAUFF, *Clerk.*

Notice of Motion for New Trial.

District Court, Wabasha County.

THE TOWN OF PLAINVIEW
ag'st
THE WINONA & ST. PETER RAILROAD COMPANY.

SIRS: You will please take notice that on the pleadings and decision and on the settled case and all the records and files in this action the defendant will make a motion herein at a special term of the district court to be held at the court-house, in the city of St. Cloud, before the Honorable L. W. Collins, judge of said court, on the 24th day of April, A. D. 1886, at 10 o'clock in the forenoon of such day or as soon thereafter as counsel can be heard, that the decision and findings herein be vacated and set aside and a new trial granted for the following causes materially affecting the substantial rights of the defendant, viz:

First. That the findings of fact are not justified by the evidence, and that the decision of the court upon the facts is contrary to law and to the evidence.

Second. For errors in law occurring at the trial and duly excepted to by the defendant.

Third. Because of the refusal of the court to make his findings more specific or to find on certain allegations of the answer.

THOMAS WILSON,
Defendant's Attorney.

To Hon. C. K. Davis and Kellogg and Eaton, plaintiff's attorneys.

Endorsed. Filed May 22, 1886. Chas. J. Stauff, clerk.

Order Denying New Trial.

The defendant in the above-entitled action having moved for a new trial and said motion having been duly argued and submitted, it is hereby denied.

Dated May 19th, 1886.

By the court:

L. W. COLLINS, *Judge.*

Endorsed: Filed May 22, 1886. Chas. J. Stauff, clerk.

218 STATE OF MINNESOTA, *County of Wabasha:*

District Court, Third Judicial District.

THE TOWN OF PLAINVIEW, Plaintiff,
against
THE WINONA & ST. PETER RAILROAD COMPANY, Defendant.

You will please take notice that the defendant appeals to the supreme court of the State of Minnesota from the order of this court

in this action entered on the 22nd day of May, 1886, denying defendant's motion for a new trial of the above-entitled action.

Dated May 27th, 1886.

WILSON & BOWERS,
Attorneys for Defendant.

To C. K. Davis & Kellogg & Eaton, attorneys for plaintiff, and Charles J. Stauff, clerk of the district court.

Endorsed: District court, county of Wabasha. The Town of Plainview, plaintiff, *vs.* The W. & St. P. R. R. Company, defendant. Notice of appeal to supreme court. Due service of the within notice is hereby admitted at —, Minnesota, on this 3d day of June, 1886. C. K. Davis & Kellogg & Eaton, pl'ff's att'ys. Wilson & Bowers, att'ys for def't. Due service of the within is hereby admitted at Wabasha, Minn., on this 8th day of June, 1886. Chas. J. Stauff, clerk. Filed June 8th, 1886. Chas. J. Stauff, clerk.

219 *Mandate.*

STATE OF MINNESOTA, } ss:
Supreme Court, }

The State of Minnesota to the hon. judge and officers of the district court of the third judicial district, sitting within and for the county of Wabasha, Greeting:

Whereas lately in your court, in an action therein pending, wherein The Town of Plainview was plaintiff and The Winona and St. Peter Railroad Company was defendant, a certain order was entered therein May 22d, 1886, from which order said defendant appealed to this, court;

And whereas the same was duly argued, heard, and submitted at the general October term, A. D. 1886, of our supreme court; after mature deliberation thereupon had our supreme court did adjudge, determine, decree, and order "that the order of the court below herein appealed from be, and the same hereby is, in all things affirmed, and that the plaintiff and respondent above named have judgment accordingly."

A copy of the entry of judgment thereupon in this court is herewith transmitted and made part of this remittitur.

Now, therefore, this mandate is to you directed and certified to inform you of these proceedings had in our supreme court in said hereinbefore-mentioned cause, and the same is hereby and herewith remanded to your court for such other or further record and proceedings therein as may be by law necessary, just, and proper under and by virtue of the said order herein made.

Witness the Hon. James Gilfillan, chief justice of the supreme court aforesaid, and the seal of said court, at St. Paul, this 25th day of July, A. D. 1887.

[Seal of the Supreme Court.]

J. D. JONES,
Clerk of the Supreme Court.

220 Endorsed: Supreme court, State of Minnesota. Mandate to the district court of Wabasha county. The Town of Plainview, resp'd't, against The Winona and St. Peter Railroad Co., app'l't. Filed July 27, 1887. Chas. J. Stauff, clerk. —— ——, attorney for —— ——.

221 STATE OF MINNESOTA, } ss:
County of Wabasha, }

District Court, Third Judicial District.

THE TOWN OF PLAINVIEW, Plaintiff,
against
THE WINONA & ST. PETER RAILROAD COMPANY, Defendant.

This action, being on the calendar for trial at the general May term of said court, A. D. 1885, and being reached in its order, was tried by the court on the 25th day of June, A. D. 1885, the Hon. L. W. Collins, district judge, presiding, a jury having been duly waived by stipulation of the parties to said action, and the court having heard the evidence and duly considered the same and having made and filed its findings of fact and conclusions of law, wherein it found as conclusions of law that the plaintiff is entitled to have and recover of the defendant the sum of fifty thousand dollars ($50,000) and interest thereon from the first day of January, A. D. 1879, at seven per cent. per annum, amounting at this date to seventy-four thousand four hundred and fifty-one and $\frac{31}{100}$ dollars ($74,451.31), together with the costs and disbursements of this action. In case entry of judgment is delayed after this date there will be added to the above amount interest on the sum of fifty thousand dollars ($50,000) from this date. Let judgment be entered accordingly.

Dated this 26th day of December, A. D. 1885.

And the defendant having made a motion for a new trial, and the said motion having been by said court denied, and the said defendant having appealed to the supreme court of the State of Minnesota from the order denying said motion for a new trial, and the said supreme court having by its judgment affirmed the order of said district court denying such motion for a new trial, and a duly certified transcript of the said judgment of the said supreme court and the mandate of the said supreme court having been duly transmitted to and filed in the said district court:

Now, therefore, on motion of C. K. Davis and Kellogg & Eaton, plaintiff's att'ys, it is by the said district court now here considered, ordered and adjudged that the said plaintiff, The Town of Plainview, do have and recover of the said defendant, The Winona & St. Peter Railroad Company, the sum of eighty thousand thirty-

222 one and $\frac{86}{100}$ dollars damages and also the sum of two hundred fifty-seven and $\frac{9}{100}$ dollars costs and disbursements, in all amounting to the sum of eighty thousand two hundred eighty-eight and $\frac{95}{100}$ dollars ($80,288.95).

Dated this 30th day of July, A. D. 1887.

By the court:

[District Court Seal.]

CHAS. J. STAUFF, *Clerk.*

Endorsed: District court, Wabasha county. Town of Plainview against The Winona & St. Peter Railroad Company. Judgment-roll, 1887. Recorded in Judgment Record "B," page 389, and docketed in Judgment Docket "A," page 300, this 1st day of August, A. D. 1887. Chas. J. Stauff, clerk. Davis & Kellogg & Eaton, pl'ff's att'ys.

223 STATE OF MINNESOTA, *County of Wabasha:*

District Court, Third Judicial District.

TOWN OF PLAINVIEW, Plaintiff,

vs.

THE WINONA AND ST. PETER RAILROAD COMPANY, Defendant.

SIRS: Take notice that the defendant in the above-entitled action, The Winona & St. Peter Railroad Company, hereby appeals to the supreme court of the State of Minnesota from the judgment of the said above-named district court entered herein on the 30th day of July, A. D. 1887, in favor of plaintiff and against the defendant; and take notice, further, that the appeal hereby taken is from the whole and every part of said judgment, and that upon said appeal said appellant, The Winona & St. Peter Railroad Company, will bring up for review the order made in the above-entitled action by the district court aforesaid, dated April 24th, 1886, denying the motion made by the defendant in the above-entitled action that further and additional findings be made and filed therein by said district court, and that the findings of said district court be amended and made more full and specific.

Dated August 6th, 1887.

WILSON & BOWERS,

Attorneys for Defendant, The Winona & St. Peter Railroad Co.

To Chas. J. Stauff, Esq., clerk of the district court in and for Wabasha county, Minn.; C. K. Davis, Esq., and Kellogg & Eaton, Esq'r's, plaintiff's attorneys.

224 Endorsed: District court, Wabasha county. Town of Plainview, plaintiff, ag'st W. & St. P. R. R. Co., defendant. Notice of appeal. Due service of the within and a copy of the bond on said appeal is hereby admitted on this 15th day of August, 1887. Kellogg & Eaton and C. K. Davis, att'ys for pl'ff. Filed August 17th, 1887. Chas. J. Stauff, clerk. Due service upon me of the within notice of appeal is hereby admitted this 17th day of August, 1887. Chas. J. Stauff, clerk.

225 District Court, Wabasha County.

TOWN OF PLAINVIEW, Plaintiff,

against

WINONA AND ST. PETER RAILROAD COMPANY, Defendant.

Know all men by these presents that we, The Winona and St. Peter Railroad Company, a corporation created by and existing under the

laws of the State of Minnesota, as principal, and Albert Keep, of Chicago, Illinois; Marvin Hughitt, of Chicago, Illinois; Henry W. Lamberton, of Winona, Minnesota, and Matthew G. Norton, of Winona, Minnesota, as sureties, are held and firmly bound unto The Town of Plainview, plaintiff in the above-entitled action, in the sum of eighty thousand and three hundred (80,300) dollars, lawful money of the United States, to be paid unto the said Town of Plainview, its successors or assigns; for which payment, well and truly to be made, we jointly and severally bind ourselves, our successors, heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 1st day of August, A. D. 1887.

The condition of this obligation is such that whereas the said The Winona and St. Peter railroad has appealed to the supreme court of the State of Minnesota from the judgment of the said district court for Wabasha county entered in the above-entitled action on the 30th day of July, A. D. 1887, in favor of plaintiff, The Town of Plainview, and against the defendant, The Winona and St. Peter Railroad Company: Now, therefore, if said appellant pay all costs and charges which may be awarded against it on the said appeal, not exceeding the penalty of this bond, and if, in case the said judgment appealed from or any part thereof is affirmed, the said appellant pay the amount directed to be paid by the said judgment or the part of such amount as to which the judgment is affirmed, if it is affirmed only in part, and all damages which are awarded against the appellant upon the said appeal, not exceeding the penalty of this bond, then this obligation to be void; otherwise to remain in full force.

In testimony whereof the said The Winona and St. Peter Railroad Company has caused its corporate seal to be hereto attached and these presents to be subscribed in its behalf, by its president, and the said sureties have hereunto set their respective hands and seals this 4th day of August, A. D. 1887.

226

WINONA & ST. PETER R. R. CO.,
By MARVIN HUGHITT, *President.*
ALBERT KEEP. [SEAL.]
MARVIN HUGHITT. [SEAL.]
HENRY W. LAMBERTON. [SEAL.]
MATTHEW G. NORTON. [SEAL.]

Signed, sealed, and delivered in presence of—

[W. & St. P. R. R. Co.'s Seal.]

Attest: J. B. REDFIELD, *Secretary.*

STATE OF ILLINOIS, } ss:
County of Cook, }

On this 4th day of August, 1887, before me personally appeared Marvin Hughitt, to me personally known, who, being by me duly sworn, did say that he is president of the Winona & St. Peter Railroad Company, a corporation, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that

said instrument was signed and sealed in behalf of said corporation by authority of its board of directors, and said Marvin Hughitt acknowledged said instrument to be the free act and deed of said corporation.

[NOTARIAL SEAL.] J. L. McKITTRICK,
Notary Public, Cook Co., Illinois.

STATE OF ILLINOIS, } ss:
County of Cook, }

On this 4th day of August, 1887, before me personally appeared Albert Keep and Marvin Hughitt, to me personally known to be the persons described in and who executed the foregoing instrument, and they acknowledged that they executed the same as their free act and deed and as the free act and deed of each of them.

[NOTARIAL SEAL.] J. L. McKITTRICK,
Notary Public.

227 STATE OF MINNESOTA, } ss:
County of Winona, }

On this 9th day of August, 1887, before me personally appeared Henry W. Lamberton and Matthew G. Norton, to me personally known to be the persons described in and who executed the foregoing instrument, and they acknowledged that they executed the same as their free act and deed and as the free act and deed of each of them.

[NOTARIAL SEAL.] B. F. HEUSTON, JR.,
Notary Public, Winona County, Minnesota.

STATE OF ILLINOIS, } ss:
County of Cook, }

Albert Keep and Marvin Hughitt, having each been duly sworn, say, each for himself, that he is one of the sureties in the foregoing bond; that he is a resident of Chicago, in the State of Illinois, and worth twice the amount of the penalty of the foregoing bond above his debts and liabilities and exclusive of his property exempt from execution.

ALBERT KEEP.
MARVIN HUGHITT.

Subscribed and sworn to before me this 4th day of August, 1887.

[NOTARIAL SEAL.] J. L. McKITTRICK,
Notary Public, Cook Co., Ill.

STATE OF MINNESOTA, } ss:
County of Winona, }

Henry W. Lamberton and Matthew G. Norton, having each been duly sworn, say, each for himself, that he is one of the sureties in the foregoing bond; that he is a resident and freeholder of the State of Minnesota and worth twice the amount of the penalty of the fore-

going bond above his debts and liabilities and exclusive of his property exempt from execution.

HENRY W. LAMBERTON.
MATTHEW G. NORTON.

Subscribed and sworn to before me this 9th day of August, 1887.
[NOTARIAL SEAL.] B. F. HEUSTON, JR.,
Notary Public, Winona County, Minnesota.

228 Endorsed: State of Minnesota, county of Wabasha. In district court. Town of Plainview ag'st W. & St. P. R. R. Co. Appeal bond. I hereby approve the within bond. Dated Aug. 12, 1887. Chas. M. Start, judge of said court. Filed Aug. 15th, 1887. Chas. J. Stauff, clerk.

229 STATE OF MINNESOTA, *County of Wabasha:*

District Court, Third Judicial District.

I, Chas. J. Stauff, clerk of district court in and for Wabasha county and State of Minnesota, do hereby certify that I have compared the foregoing paper writing with the original summons, complaint, stipulation (amending complaint), answer, reply, case, notice of motion for a new trial, order denying motion, notice of appeal, mandate supreme court, judgment, notice, and bond on appeal in the action therein entitled now remaining of record in my office, and that the same is a true and correct copy and transcript of said original and the whole thereof.

Witness my hand and seal of said court, at Wabasha, this 4th day of November, A. D. 1887.

[Seal District Court, Wabasha County, Minn.]

CHAS. J. STAUFF,
Clerk District Court, Wabasha County, Minn.

And afterwards the following further proceedings were had in said cause in the supreme court of the State of Minnesota, to wit:

230 *Note of Issue.*

Supreme Court.

TOWN OF PLAINVIEW, Pl'ff & Respondent,
against
WINONA & ST. PETER RAILROAD COMPANY, Def't & Appellant. } 5162.

Notice of appeal, dated Aug. 13th, 1887.
Kellogg & C. K. Davis, attorneys for plaintiff.
Wilson & Bowers, attorneys for defendant.

Will the clerk please file this note of issue and enter the cause on the calendar for the April, A. D. 1888, term of this court.

Yours, &c., WILSON & BOWERS,
Attorneys for Def't & Appellant.

[Endorsed:] Filed March 22, 1888. J. D. Jones, clerk.

231 STATE OF MINNESOTA:

In Supreme Court.

TOWN OF PLAINVIEW, Respondent,
vs.
THE WINONA & ST. PETER RAILROAD COMPANY, Appellant.

To Wilson & Bowers, attorneys for appellant:

You will take notice that upon the record in this case, which is on file in the supreme court, and upon your assignment of errors, points, and authorities heretofore served, the undersigned will move the court upon the opening of the next session thereof, on Tuesday, the 3d day of April, 1888, at eleven o'clock in the forenoon, or as soon thereafter as counsel can be heard, at the capitol, in St. Paul, for an order dismissing said appeal or affirming the judgment of the court below. The grounds of said motion are that upon an appeal in this cause from an order denying the motion for a new trial therein at the October term of this court, 1886, all the questions now sought to be raised and argued by the assignment of errors, points, and authorities heretofore served were either raised by counsel and
232 duly considered by this court on said former appeal or might have been assigned as error by counsel on said former appeal, and that all questions which were either raised or decided or which might have been raised or decided on said former appeal are *res adjudicata* and cannot be raised or discussed or considered upon this appeal.

Dated March 22, 1888.

DAVIS, KELLOGG & SEVERANCE &
BURT W. EATON,
Attorneys for Respondent.

C. W. BUNN, *Of Counsel.*

233 [Endorsed:] 5163. (5.) State of Minnesota. In supreme court. Town of Plainview *vs.* The Winona & St. Peter Railroad Company. Notice of motion to dismiss appeal. Service of the within notice of motion admitted this 23d day of March, A. D. 1888. Wilson & Bowers, attorneys for appellant. Filed April 19, 1888. J. D. Jones, clerk.

234 *Affidavit of Disbursements on Trial and Notice of Taxation of Costs.*

STATE OF MINNESOTA :

Supreme Court.

THE TOWN OF PLAINVIEW.
against
THE WINONA AND ST. PETER RAILROAD COMPANY.

Costs and disbursements:

Statute costs (att'ys' fees)	$25 00
Disbursements:	
Clerk's fees (to be taxed)	9 50
Printing pl'ff's brief	5 00
	$39 50

Costs and disbursements taxed and allowed at $39.50 in favor of respondent.
May 9, 1888.

J. D. JONES, *Clerk.*

STATE OF MINNESOTA, *County of Ramsey,* } ss:

Frank B. Kellogg, being duly sworn, says that he is one of the plaintiff's attorneys in the above-entitled action; that the foregoing bill and items of disbursements therein are just and correct, and have been necessarily paid or incurred therein.

FRANK B. KELLOGG.

Subscribed and sworn to before me on this 30th day of April, 1888.

[NOTARIAL SEAL.] C. W. G. WITHER,
Notary Public, Ramsey Co., Minn.

235 [Endorsed:] 5163. (5.) Supreme court State of Minnesota. Town of Plainview against The W. & St. Peter R. R. Co. Filed May 4th, 1888. J. D. Jones, clerk. Affidavit of disbursements and notice of taxation of costs. Due service of the within is hereby admitted this 2d day of May, 1888. Wilson & Bowers, att'ys for def't. Davis, Kellogg & Severance, attorneys for plaintiff.

To Wilson & Bowers, attorneys for defendant & appellant, Winona, Minn.

DEAR SIR-: Please to take notice that on the 4th day of May, A. D. 1888, at 9½ o'clock a. m., application will be made to J. D. Jones, Esq., clerk of said court, at his office, in the capitol, in the city of

St. Paul, Minn., to have the foregoing items of costs and disbursements taxed and inserted in the judgment to be entered herein.

Yours respectfully,

DAVIS, KELLOGG & SEVERANCE,
Attorneys for Pl'ff & Respondent.

Dated April 30, 1888.

236 STATE OF MINNESOTA:

Supreme Court. General April Term, A. D. 1888.

THE TOWN OF ELGIN, Respondent,
vs.
THE WINONA & ST. PETER RAILROAD COMPANY, Appellant, } 5162. 43.

and

THE TOWN OF PLAINVIEW, Respondent,
vs.
THE WINONA & ST. PETER RAILROAD COMPANY, Appellant. } 5163. 44.

THURSDAY MORNING, 9.30 O'CLOCK, *April 19th, A. D.* 1888.

Court convened pursuant to adjournment, all the justices being present.

These causes came on to be heard this day upon the motion of respondents to dismiss the appeals herein or affirm the judgments of the court below, and upon hearing counsel thereon and upon due consideration thereof, it is ordered that the judgments of the court below herein appealed from be, and each of them are hereby, affirmed for the reason stated and given in the opinion of this court upon the former appeals in these cases from the order of the court below denying a new trial therein, and that the respondents have judgment accordingly.

Ordered further, That upon entry of judgment in these causes that all proceedings thereon be stayed for thirty days from and after such entry.

A true record.

Attest: J. D. JONES, *Clerk.*

The foregoing is a full and true copy of the minutes of argument and order in the above-entitled cause.

Attest: J. D. JONES, *Clerk.*

237 [Endorsed:] 5162 & 5163. State of Minnesota supreme court. Towns of Plainview & Elgin *vs.* Winona & St. Peter R. R. Co. Copy of minutes of argument and order. Filed ——, A. D. 188–. —— ——, clerk. F. R. F., 145.

238 STATE OF MINNESOTA:

Supreme Court. April Term, A. D. 1888.

THE TOWN OF PLAINVIEW, Respondent,
vs.
THE WINONA & ST. PETER RAILROAD COMPANY, Appellant. } No. 44.

Pursuant to an order of court duly made and entered in this cause on the 19th day of April, A. D. 1888, it is here and hereby determined and adjudged that the judgment of the court below, herein appealed from, to wit, of the district court of the third judicial district, sitting within and for the county of Wabasha, be, and the same hereby is, in all things affirmed.

And it is further determined and adjudged that the respondent above named do have and recover of said The Winona & St. Peter Railroad Company, appellant herein, the sum and amount of thirty-nine and $\frac{50}{100}$ dollars ($39.50), costs and disbursements in this cause in this court, and that said respondent have execution for the enforcement thereof.

Dated and signed this 9th day of May, 1888.

By the court.

[Seal of the Supreme Court, Minn.]

Attest: J. D. JONES, *Clerk.*

Statement for Judgment.

Costs allowed by statute	$25 00
Clerk's fees for making return	
Printer's fees for printing brief	5 00
Clerk's fees, supreme court	9 50
Execution and return	
Filing mandate and docketing transcript	
— affidavits and acknowledgments	
Postage	
Copying return for printer	
	$39 50

239 [Endorsed:] 5163. State of Minnesota supreme court. Transcript of judgment. Filed May 9th, A. D. 1888. J. D. Jones, clerk. —— ——, attorney for —— ——. Page No. ——, — Book.

STATE OF MINNESOTA, } ss:
Supreme Court, }

I, J. D. Jones, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the cause therein entitled as appears from the original remaining of record in my office; that I have carefully compared the within copy

with said original, and that the same is a correct transcript therefrom.

Witness my hand and the seal of said supreme court, at the capitol, in the city of St. Paul, this 9th day of May, A. D. 1888.

[Seal of the Supreme Court, Minn.]

J. D. JONES, *Clerk.*

240 Supreme Court of the State of Minnesota.

THE TOWN OF PLAINVIEW, Plaintiff,

vs.

THE WINONA AND ST. PETER RAILROAD COMPANY, Defendant.

The defendant, The Winona and St. Peter Railroad Company, having duly petitioned for the allowance of a writ of error from the Supreme Court of the United States to the supreme court of the State of Minnesota to bring into the former court the judgment of the latter court rendered in this action on the 9th day of May, 1888, against said defendant, in order that said judgment may be reviewed by said Supreme Court of the United States: Now, on motion of the attorneys for said defendant, it is hereby ordered that the clerk of the circuit court of the United States for the district of Minnesota issue a writ of error from the Supreme Court of the United States to the supreme court of the State of Minnesota in reference to and to bring into said Supreme Court of the United States for re-
241 view the judgment of the supreme court of the State of Minnesota in the above-entitled action against the defendant, The Winona and St. Peter Railroad Company, rendered on the 9th day of May, 1888.

It is further ordered hereby that the bond given by the defendant, The Winona and St. Peter Railroad Company, upon the issue of the citation by me in pursuance of said writ of error be in the sum of one hundred thousand dollars, and in the form required by law, and with sureties to be approved by me.

Dated May 9th, 1888.

JAMES GILFILLAN,
Chief Justice Supreme Court, Minnesota.

242 Supreme Court, State of Minnesota.

THE TOWN OF PLAINVIEW, Plaintiff,

vs.

THE WINONA AND ST. PETER RAILROAD COMPANY, Defendant.

The defendant in the above-entitled cause respectfully represents and shows that the above-entitled cause was brought to recover the face value of certain bonds issued by the above-named plaintiff town which this defendant before this action was brought had, for a valuable consideration, acquired and transferred to other holders, and that at the time said bonds were earned and issued they were valid and legal obligations of the plaintiff town, properly and legally issued under and in strict conformity with the then existing statutes

and laws of the State of Minnesota, and they were then valid under the decisions of the supreme court of the State of Minnesota theretofore made; that the district court of the State of Minne-
243 sota in which this action was begun and the supreme court of Minnesota, in the decision of this case, did disregard and change the decisions of said supreme court before made in such cases and the statutes and laws of the State of Minnesota which were in force when said bonds were earned and issued, in violation of the then existing contract rights of the holders of the said bonds; all of which appears in the records of said supreme court and all of which your petitioner claims and alleges is in violation of the Constitution of the United States forbidding the impairment of the obligation of contracts.

And this defendant, your petitioner, further respectfully represents that prior to the commencement of this action and after the transfer of said bonds by this defendant Samuel Marshall and Charles F. Ilsley, who had become the owners of certain of said bonds under this defendant, brought an action thereon against this plaintiff town in the circuit court of the United States for
244 the district of Minnesota, which said court, then and there having jurisdiction of the parties and the subject-matter, held, decided, and adjudged that the said bonds were legal and valid obligations of this plaintiff town, and that it should pay the same to said Marshall and Ilsley; which said judgment was when this action was begun and still is in full force and unreversed and unmodified.

And the said district court of the State of Minnesota and the supreme court of the State of Minnesota failed and refused to give full or any force or effect to said judgment of the said circuit court of the United States, except that each of them held and decided that said judgment was against law and invalid, and that by the rendition and execution thereof this plaintiff town was legally damnified, and that on account of its rendition and the payment of part and the liability to pay the rest of said bonds by plaintiff town thereunder this defendant became and was liable to this plaintiff town in this suit; all of which appears of record in the supreme court of Minnesota; and this defendant, your petitioner, claims and insists that in dis-
245 allowing validity or effect to the said judgment of the circuit court of the United States the district court and the supreme court of Minnesota disregarded and violated the Constitution and laws of the United States; that the supreme court of Minnesota is the highest court of that State in which a decision of this suit could be had.

This defendant, your petitioner, further represents and shows that it feels aggrieved by the said judgment of the supreme court of Minnesota rendered in this suit on the 9th day of May, A. D. 1888, affirming the judgment of the said district court of Minnesota; and in consideration of the premises, and because it claims that there is drawn in question in this suit the validity of an authority exercised under the United States and the decision of the supreme court of Minnesota was against its validity, and because it claims that

in this suit a title, right, privilege, and immunity was by it set up and claimed under the Constitution of the United States and the decision of said supreme court was against such title, right, privilege, and immunity, and because in this suit a title,
246 right, privilege, and immunity was claimed by it under an authority exercised under the United States and the decision was against the title, right, privilege, and immunity claimed or set up under such authority, and because it claims that the said decision of the supreme court of Minnesota changing the operation, force, and meaning of the statutes and laws of the State of Minnesota was an impairment of the obligation of the contract of the plaintiff town with the holders of said bonds, all of which appears by the records of the proceedings in said suit herewith submitted, this defendant claims the right to remove said judgment of the supreme court of Minnesota to the Supreme Court of the United States by writ of error under section 709 of the Rev. Stat. of the United States.

Wherefore your petitioner prays the allowance of a writ of error returnable into the Supreme Court of the United States, and for citation and supersedeas; and your petitioner will pray.

247 St. Paul, May 9th, 1888.

THE WINONA & ST. PETER RAILROAD COMPANY,
By THOMAS WILSON, *Its Attorney.*

Allowed this 9th day of May, A. D., 1888.

JAMES GILFILLAN,
Chief Justice Sup. Court, Minn.

248 [Endorsed:] 5163. (6.) Supreme court, State of Minnesota. Town of Plainview, pl'ff, *vs.* The Winona & St. Peter Railroad Company. Petition and order for writ of error. Filed June 7th, 1888. Wilson & Bowers, defendant's attorneys, Winona, Minn.

249 Know all men by these presents that we, The Winona & St. Peter Railroad Company, as principal, and Albert Keep, Marvin Hughitt, and Nathaniel K. Fairbanks, all of Chicago, Illinois, as sureties, are held and firmly bound unto the Town of Plainview, in the full and just sum of one hundred thousand dollars, to be paid to the said Town of Plainview, its successors, attorneys, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 15th day of May, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas lately, at a term of the supreme court of the State of Minnesota, in a suit depending in said court between The Town of Plainview, plaintiff, and The Winona & St. Peter Railroad Company, defendant, a judgment was rendered against the said Winona & St. Peter Railroad Company on the 9th day of May, 1888, and the said The Winona & St. Peter Railroad Company having obtained a writ of error and filed a copy thereof in the clerk's office of the

said court to reverse said judgment in the aforesaid suit, and
250 a citation, directed to the said Town of Plainview, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said The Winona & St. Peter Railroad Company shall prosecute its writ of error to effect and answer all damages and costs if it fail to make its plea good; then the above obligation to be void; else to remain in full force and virtue.

THE WINONA AND ST. PETER
RAILROAD COMPANY, [SEAL.]
By MARVIN HUGHITT, *President.* [SEAL.]
MARVIN HUGHITT. [SEAL.]
ALBERT KEEP. [SEAL.]
NATHANIEL K. FAIRBANK. [SEAL.]

[Seal Winona & St. Peter Railroad Company.]

Attest: J. B. REDFIELD, *Secretary.*

Sealed and delivered in presence of—
W. R. KEEP.
J. L. McKITTRICK.

Approved by me this 7th day of June, 1888, and ordered that upon the filing of said bond the writ of error taken as in said bond recited shall operate as a supersedeas and stay execution of said judgment referred to in said bond.

JAMES GILFILLAN,
Chief Justice Supreme Court, Minnesota.

251 [Endorsed:] 5163. (7.) Town of Plainview, pl'ff, *vs.* The Winona & St. Peter R. R. Co., def't. Bond on writ of error. Filed June 7, 1888. J. D. Jones, clerk.

252 And on the 7th day of June, 1888, the original writ of error in this action, which said writ is returned herewith, and a copy thereof were lodged and filed by defendant, The Winona and St. Peter Railroad Company, in the office of the clerk of said supreme court of the State of Minnesota.

253 And on the 28th day of August, 1886, there was filed in the office of the clerk of the supreme court of the State of Minnesota a return to said supreme court from the district court of the State of Minnesota for the county of Wabasha, which was in its words and figures and in all respects the same as the return to said supreme court from said district court for the county of Wabasha, which was filed in the office of the clerk of said supreme court as aforesaid on the 7th day of November, 1887, and which is hereinbefore fully set forth, except that the said return filed as aforesaid on the 28th day of August, 1886, differs from the said return filed as aforesaid on the 7th day of November, 1887, in that the former, being also the earlier, of said two returns did not contain the following-named papers contained and set forth as

aforesaid in and being parts of said later return, to wit, the parts of said later return appearing therein hereinbefore after the notice of appeal from the order of the district court for Wabasha county denying a new trial and being the following five papers: The mandate from the supreme court of Minnesota to the district court for Wabasha county, dated July 25th, 1887; the judgment of the district court for Wabasha county; the notice of appeal from said judgment of the district court for Wabasha county; the appeal bond dated August 1st, 1887, and approved August 12th, 1887, given upon the appeal from said judgment of the district court for Wabasha county, and the certificate, dated November 4th, 1887, of the clerk of the district court for Wabasha county to the said return, filed in the office of the clerk of the supreme court of the State of Minnesota on the 7th day of November, 1887; and except, further, that said earlier return,
254 filed on the 28th day of August, 1886, differs also from said later return, filed on the 7th day of November, 1887, in that the former, earlier, return contained the following papers and parts which were not contained in said later return, and are therefore not hereinbefore set forth, to wit: Five certain stipulations; bond on appeal from the order of the district court for Wabasha county denying defendant's motion for a new trial, which bond is dated June 2nd, 1886, and was approved June 4th, 1886, and the certificate, dated Aug. 24th, 1886, of the clerk of the district court for Wabasha county; all of which said papers not contained in said later return and not hereinbefore fully set forth are in the words and figures following, to wit:

255 STATE OF MINNESOTA, } *ss:*
Wabasha County, }

District Court, Third Judicial District.

THE TOWN OF PLAINVIEW, Plaintiff,

vs.

THE WINONA AND ST. PETER RAILROAD COMPANY, Defendant.

It is hereby stipulated and agreed that the above case be placed on the calendar for trial at the next November general term of said court, to be holden at Wabasha on November 10th, A. D. 1884, and notice of trial is hereby waived and plaintiff is allowed until first day of term to reply, and also waive filing of note of issue and authorize the clerk to put the above case on the calendar: Provided, That nothing in this stipulation shall lessen the rights of either party to move for a postponement or continuance of the case or for a change of the place of trial: Provided, further, That the right of the defendant to move for a continuance or postponement of the trial shall not be claimed or allowed on the ground that the issue was not made up or the answer served earlier, it being admitted that time to answer was given — extended with the understanding

that the plaintiff's right to trial at the next term of court should not thereby be lost or waived.

Winona, Nov. 3, 1884.

THOMAS WILSON,
Att'y for Def't.
KELLOGG & EATON &
C. K. DAVIS,
Pl'ff's Att'ys.

Endorsed: Town of Plainview ag'st Winona & St. Peter R. R. Co. Stipulation. Filed Nov. 8, 1884. Chas. J. Stauff, clerk.

256 *Stipulation.*

District Court, Wabasha County.

THE TOWN OF PLAINVIEW
vs.
THE WINONA & ST. PETER RAILROAD COMPANY.

It is hereby stipulated and admitted that the defendant may amend its answer by writing the following allegations before the prayer for judgment, viz:

The defendant further answers that it admits and alleges that a suit was brought by George W. Harrington against the supervisors of the above Town of Plainview, the plaintiff, and against the said town and The Plainview Railroad Company, in which it was alleged, among other things, that the laws under which the said bonds of the said town (particularly referred to in this action) were about to be issued to the said Plainview Railroad Company was unconstitutional and void, and in which action it was sought to enjoin the issue of said bonds.

That issue was joined in the said action and the same was brought on for trial and duly tried and judgment therein duly rendered, in and by which it was determined, directed, adjudged, and decreed that the law under which the said bonds were about to be issued was constitutional and valid, and that the proper steps had been taken to authorize and justify the issuance of the said bonds, and that the said Plainview Railroad Company had earned and was entitled to the said bonds, which said judgment was duly rendered and made and still stands in full force, unreversed and unmodified; that this plaintiff and the said Plainview Railroad Company were parties to and participated in the said litigation and are bound by the said judgment; that the said judgment was rendered prior to the purchase of the road or franchises of the said Plainview Railroad Company by the defendant.

And, save and except as alleged in the complaint and reply, all and singular the above matters are to be construed as fully denied,
257 and that without further pleading plaintiff may introduce proof of new matter to contradict matters of the above amendment or apply thereto such proofs as are already in evidence.

It is further stipulated that, without further action, the amend-

ment stipulated to the complaint touching the above subject-matter and this amendment shall be construed as made and introduced into the complaint and answer, respectively.

Wabasha, June 26, 1885.

KELLOGG & EATON & C. K. DAVIS,
Pl'ff's Att'ys.

THOMAS WILSON, *Def't's Att'y.*

Endorsed: Filed June 26, 1885. Chas. J. Stauff, clerk.

258 STATE OF MINNESOTA, *Wabasha County:*

District Court.

THE TOWN OF PLAINVIEW
vs.
THE WINONA AND ST. PETER RAILROAD COMPANY.

THE TOWN OF ELGIN
vs.
THE WINONA AND ST. PETER RAILROAD COMPANY

It is hereby stipulated in each and both of the above-entitled actions that a jury is waived and that the cases be tried by the court.

Winona, May 12, 1885.

KELLOGG & EATON & C. K. DAVIS.

Endorsed: District court, Wabasha county, State of Minnesota. Town of Plainview *v.* The Winona and St. Peter R'y Co. Town of Elgin *vs.* Same. Waiver of jury trial. Filed June 26, 1885. Chas. J. Stauff, cl'k.

259 District Court, Wabasha County.

TOWN OF PLAINVIEW *vs.* W. & St. P. R. R. Co.

It is hereby stipulated that the defendant's attorney may, at any time within twenty days, *after* any evidence, subject to the objection and exceptions of pl'ff's att'ys *and touching* that the same is incompetent and immaterial,—the question whether the supreme court of this State has reversed the judgment in the Harrington case or whether the appeal from the judgment in that case has been argued or decided, plaintiff to have the right within twenty days after said evidence is offered to adduce evidence to rebut the same.

Wabasha, June 20, 1885.

KELLOGG & EATON & C. K. DAVIS,
Pl'ff's Att'ys.

THOMAS WILSON.

Endorsed: Filed June 26, 1885. Chas. J. Stauff, clerk.

260 STATE OF MINNESOTA, *Wabasha County:*

District Court, 3d Judicial District.

THE TOWN OF PLAINVIEW, Plaintiff,
ag'st
THE WINONA & ST. PETER RAILROAD COMPANY, Def't.

THE TOWN OF ELGIN, P.,
vs.
THE WINONA & ST. PETER RAILROAD COMPANY, Def'ts.

THE TOWN OF PLAINVIEW, Pl'ff,
vs.
THE PLAINVIEW RAILROAD COMPANY, Def't.

THE TOWN OF ELGIN
v.
THE PLAINVIEW RAILROAD COMPANY, Def't.

It is hereby stipulated by and between the plaintiff and defendant in the first two cases therein entitled that all depositions taken or to be taken in Milwaukee or Chicago within five days from this date or on this date of said two actions may be rec'd in evidence in either of said actions, and also in either of the two last actions above entitled, subject to any objections as to competency, irrelevancy, or materiality of said depositions or any part thereof as to the last two actions. Thomas Wilson stipulated only on behalf of the Winona & St. Peter Railroad Company, which company filed answers of instruments in said action, and he does not stipulate in said action in behalf of the Plainview Railroad Company for the reason that he has never appeared for said Plainview Railroad Company and this stipulation is not to be construed as such appearance.

261 Dated April 2d, 1885.

KELLOGG & EATON & C. K. DAVIS,
Attorneys for Plaintiff in All of said Actions.
THOMAS WILSON, *Att'y for Def't.*

Endorsed: Filed June 26, 1885. Chas. J. Stauff, clerk.

262 STATE OF MINNESOTA, } ss:
County of Wabasha, }

District Court, Third Judicial District.

THE TOWN OF PLAINVIEW, Plaintiff and Respondent,
against
THE WINONA AND ST. PETER RAILROAD COMPANY, Defendant and Appellant.

Know all men by these presents that we, The Winona and St. Peter Railroad Company, as principal, and Henry W. Lamberton, of the city of Winona, county of Winona, and State of Minnesota, as

surety, are held and firmly bound unto The Town of Plainview, plaintiff above-named, in the sum of ten thousand dollars, lawful money of the United States, to be paid unto the said Town of Plainview, its successors or assigns; for which payment, well and truly to be made, we jointly and severally bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 2nd day of June, A. D. 1886.

The condition of this obligation is such that whereas the said defendant, The Winona and St. Peter Railroad Company, has appealed to the supreme court of the State of Minnesota from
263 an order of the district court, entered on the 22nd day of May, 1886, denying defendant's motion for a new trial of the above-entitled action:

Now, therefore, if said defendant, The Winona and St. Peter Railroad Company, shall pay all costs and charges that may be awarded against it on said appeal and all damages sustained thereby, if said order appealed from or any part thereof is affirmed or said appeal is dismissed, not exceeding the penalty of this bond, and if said defendant shall abide and satisfy the judgment or order of said supreme court, then this obligation shall be void; otherwise of force.

In testimony whereof we have hereunto set our hands and seals on this 2nd day of June, A. D. 1886.

[SEAL.] WINONA & ST. PETER RAILROAD CO.
By THOMAS WILSON, *Its Attorney.*
[SEAL.] HENRY W. LAMBERTON.

Signed, sealed, and delivered in presence of—
B. T. HEUSTON, JR.
H. M. LAMBERTON.

STATE OF MINNESOTA, } ss:
County of Winona, }

On this second day of June, 1886, before me, a notary public in and for the county of Winona and State of Minnesota, personally
264 appeared Henry W. Lamberton, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed; and before me, on said —, also appeared Thomas Wilson, to me known to be the person who executed the foregoing instrument in behalf of the Winona & St. Peter Railroad Company, and acknowledged that he executed the same as the free act and deed of said Winona and St. Peter Railroad Company.

[SEAL.] H. M. LAMBERTON,
Notary Public, Winona County.

Henry W. Lamberton, having first been duly sworn, says that he is the surety named in the foregoing bond; that he is a resident and freeholder of the State of Minnesota, and that he is worth the sum of twenty thousand dollars above his debts and liabilities and exclusive of his property exempt from execution.

HENRY W. LAMBERTON.

Sworn to before me this second day of June, A. D. 1886.
[SEAL.] H. M. LAMBERTON,
Notary Public, Winona Co., Minn.

265 Endorsed: District court, county of Wabasha. The Town of Plainview, pl'ff & resp't, ag'st The W. & St. Peter R. R. Co., def't & app't. Bond on appeal. I hereby approve the within bond and the sureties thereon. Dated June 4th, A. D. 1886. L. W. Collins, judge. Wilson & Bowers, attorneys for def't, Winona, Minn.

266 STATE OF MINNESOTA, *County of Wabasha:*

District Court, Third Judicial District.

I, Chas. J. Stauff, clerk of district court in and for Wabasha county and State of Minnesota, do hereby certify that I have compared the foregoing paper writing with the original summons, complaint, amended complaint, answer, reply, stipulations, case, notice of motion for a new trial, order denying motion; notice of appeal, and bond on appeal in the action therein entitled, now remaining of record in my office, and that the same is a true and correct copy and transcript of said original and the whole thereof.

Witness my hand and seal of said court, at Wabasha, this 24th day of August, A. D. 1886.

[Seal District Court, Wabasha County.]

CHAS. J. STAUFF,
Clerk District Court, Wabasha County, Minn.,
By —— ——, *Deputy.*

And after the filing in said supreme court of the State of Minnesota of said return from the district court for Wabasha county, which was filed as aforesaid on the 28th day of August, 1886, the following proceedings were had in said cause in said supreme court of the State of Minnesota, to wit:

267 STATE OF MINNESOTA:

Supreme Court. General April Term, A. D. 1887.

THE TOWN OF PLAINVIEW, Respondent,
vs.
THE WINONA & ST. PETER R. R. Co., Appellant. } No. 50. 4634.

MONDAY MORNING, 9.30 O'CLOCK, *May 2d, A. D.* 1887.

Court convened pursuant to adjournment, all the justices being present.

This cause coming on to be heard this day upon the motion of counsel for appellant for a stay of proceedings therein—

It is ordered that all proceedings in each of said causes be stayed for the period of thirty-five days from the date of this order.

A true record.

Attest: J. D. JONES, *Clerk.*

[Endorsed:] State of Minnesota supreme court. Copy of minutes of argument. Filed —— —, A. D. 188–. —— ——, clerk.

268 STATE OF MINNESOTA:

Supreme Court. General April Term, A. D. 1887.

THE TOWN OF PLAINVIEW, Respondent,
vs.
THE WINONA & ST. PETER RAILROAD COMPANY, Appellant. } No. 50. 4634.

MONDAY MORNING, 9.30 O'CLOCK, *June 6th, A. D.* 1887.

Court convened pursuant to adjournment, all the justices being present.

It is ordered that the stay of proceedings heretofore granted in this cause be, and the same is hereby, continued until the determination of the motion or application for reargument thereon.

A true record.

Attest: J. D. JONES, *Clerk.*

[Endorsed:] State of Minnesota supreme court. Copy of minutes of argument. Filed —— —, 188–. —— ——, clerk.

269 STATE OF MINNESOTA:

Supreme Court.

THE TOWN OF PLAINVIEW
v.
THE WINONA & ST. PETER RAILROAD COMPANY.

THE TOWN OF ELGIN
v.
THE WINONA & ST. PETER RAILROAD COMPANY.

The application for leave to reargue the above-entitled causes *are* hereby denied and the stay of proceedings in each case vacated.

July 21, 1887.

JAMES GILFILLAN,
Chief Justice.

270 STATE OF MINNESOTA:

Supreme Court. October Term, A. D. 1886.

THE TOWN OF PLAINVIEW, Resp't,
vs.
THE WINONA & ST. PETER RAILROAD COMPANY, Appellant. } No. 50.

Appeal from district court, third judicial district, county of Wabasha.

This cause having been duly argued and submitted at the general October term of this court, A. D. 1886, upon the return to the appeal herein:

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the order of the court below herein appealed from be, and the same hereby is, in all things affirmed, and that the respondent above named have judgment accordingly.

Entered July 25th, A. D. 1887.

By the court.

Attest: J. D. JONES, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original order for judgment entered in the above-entitled cause.

[Seal of Supreme Court.]

Attest: J. D. JONES, *Clerk.*

[Endorsed:] No. 4634. State of Minnesota supreme court. Copy of order for judgment. Filed July 25, A. D. 1887. —— ——, clerk. Entered on page 414, — "E."

271 STATE OF MINNESOTA:

Supreme Court. October Term, A. D. 1886.

THE TOWN OF PLAINVIEW, Respondent,
vs.
THE WINONA AND ST. PETER RAILROAD COMPANY, Appellant. } No. 50. 4634.

Pursuant to an order of court duly made and entered in this cause on the 25th day of July, A. D. 1887, it is here and hereby determined and adjudged that the order of the court below herein appealed from, to wit, of the district court of the third judicial district, sitting within and for the county of Wabasha, be, and the same hereby is, in all things affirmed.

And it is further determined and adjudged that the respondent above named do have and recover of said The Winona and St. Peter Railroad Company, appellant herein, the sum and amount of one hundred fifty-four and $\frac{60}{100}$ dollars ($154.60), costs and disbursements in this cause in this court, and that said respondent have execution for the enforcement thereof.

Dated and signed this 25th day of July, 1887.

By the court.

Attest: J. D. JONES, *Clerk.*

Statement for Judgment.

Costs allowed by statute	$25 00
Clerk's fees for making return	
Printer's fees for printing paper, book, and briefs, etc.	117 00
Clerk's fees, supreme court	12 60
Execution and return	
Filing mandate and docketing transcript	
Affidavits and acknowledgments	
Postage	
Copying return for printer	
	$154 60

272 [Endorsed:] 4634. State of Minnesota supreme court. Transcript of judgment. Filed July 25, A. D. 1887. J. D. Jones, clerk. C. K. Davis, Kellogg & Eaton & C. W. Bunn, attorneys for resp't. Page No. 328, "I" Book.

STATE OF MINNESOTA, *Supreme Court*, } ss:

I, J. D. Jones, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom.

Witness my hand and the seal of said supreme court, at the capitol, in the city of St. Paul, this 25th day of July, A. D. 1887.

[Seal of Supreme Court.]

J. D. JONES, *Clerk.*

273 And on the 28th day of April, 1887, there was handed down & filed in the office of the clerk of the supreme court of the State of Minnesota the syllabus & opinion of said supreme court in words & figures following, to wit:

Syllabus.

STATE OF MINNESOTA:

Supreme Court. October Term, A. D. 1886.

THE TOWN OF PLAINVIEW, Respondent,
vs.
THE WINONA & ST. PETER RAILROAD COMPANY, Appellant. } 4633.

An agreement entered into between a railway Co. and the authorities of a town upon petition of a majority of the tax-payers, in pursuance of the provisions of sec. 7, ch. 106, Laws 1877, for the issuance of the bonds of such town, is invalid and imposes no legal obligation upon the town by reason of the unconstitutionality of the statute, and the latter in its corporate capacity is not estopped to resist the enforcement of bonds so issued by the completion of
274 a line of railroad under the agreement by such company, following Harrington *vs.* Plainview, 27 Minn., 224.

Where a railroad company procured negotiable bonds to be so issued by the officers of a town under the section of the statute referred to, which were in form the obligations of the town and recited on their face that they were issued under such an agreement, and which were accepted by such company and negotiated and transferred by it for the full face value thereof, and were subsequently negotiated and sold to the citizens of another State, who, in an action in the circuit court of the United States brought against the town to recover overdue interest, and tried upon the merits, recovered final judgment therefor, which fixed the liability of the town for

the whole amount of such bonds to the holders thereof: held, that the acts of the company in procuring and negotiating the
275 bonds were without authority of law and wrongful, and that by reason thereof a cause of action arose in favor of the town and against the company for the recovery of the amount of such bonds with interest.

Under Special Laws, 1881, ch. 414, upon the purchase by the Winona & St. Peter R. R. Co. of the property and franchises of the Plainview R. R. Co. it succeeded to the liabilities of the latter company, including the claim involved in this suit.

276 *Opinion.*

STATE OF MINNESOTA:

Supreme Court. October Term, A. D. 1886.

THE TOWN OF PLAINVIEW, Respondent,

vs.

THE WINONA & ST. PETER RAILROAD COMPANY, Appellant.

The Town of Plainview seeks to recover the value of certain bonds issued by its officers in its behalf and alleged to have been procured by the Plainview Railway Co. without authority of law, and thereafter negotiated, and which the town have in consequence paid or are obliged to pay to the present owners. The case presents some novel features and involves questions of considerable doubt and difficulty, in the solution of which the court can find but little aid from precedents.

277 The question of the validity of these bonds was considered and determined in the case of Harrington *vs.* this plaintiff and the Plainview R. R. Co., 27 Minn. R., 228, adversely to the railroad company, and that decision must be accepted, without further discussion, as the law governing this case.

The bonds were not issued upon the vote of the electors of the town in pursuance of Laws 1877, ch. 106, sec. 5, but in pursuance of sec. 7 of that act, upon a petition of a majority of the tax-payers. The proceedings to procure such bonds were initiated and prosecuted by the railway company under the act by filing with the town clerk its proposition in writing for the issuance to it of the bonds of the town, as provided by section 4, and thereafter in securing and filing the petition of the tax-payers, as directed by section 7.

We have no hesitation in saying that the evidence in the case is sufficient to uphold the finding of the trial court that the bonds
278 in controversy were issued to the Plainview R. R. Co. and were by its agents transferred to the Chicago and Northwestern R. R. Co. at their par value and in consideration of the amount due the latter company, which had been previously advanced by the Chicago Company in aid of the construction of the Plainview Company's road.

Before the issuance of the bonds the action above referred to was commenced to enjoin the same, and while the case was pending in this court the bonds were issued and transferred.

The evidence, however, does not warrant the conclusion that there was any actual fraud in the procurement or transfer of the bonds. Both railway companies were cognizant of the pendency of the action and of the grounds of the alleged invalidity of the bonds, but the legal questions involved were still open and in dispute, and they were advised and believed them to be legal and valid.

It is affirmed by the trial court upon sufficient evidence that, except as appears upon the face of the bonds, Marshall & Ilsey and
279 others, to whom they were subsequently transferred, had no notice of the suit and were *bona fide* purchasers and holders for value. The Chicago & N. W. R. R. Co. was a foreign corporation, and the subsequent purchasers of the bonds were and are citizens of other States.

The bonds all recite on their face that they were issued in pursuance of the authority given for that purpose by the laws of the State of Minnesota and in compliance with a resolution of the board of supervisors of the town, and also "in pursuance of a mutual agreement, which agreement was made in accordance with the laws of Minnesota and through and by a proposition made by said railroad company and duly accepted by said town upon petition therefor signed by a majority of the resident tax-payers, said agreement having been duly performed by said railroad company on its part."

This court held in the Harrington case that an agreement consummated by proceedings under the provisions of the statute referred to, between the railway company and a majority of the tax-
280 payers, could not under the constitution be considered as the lawful agreement of the town nor be of any binding obligation as such, and that bonds issued in pursuance thereof would be void except in the hands of *bona fide* purchasers.

1. These bonds were invalid in the hands of the Plainview Company and could not have been enforced by it.

It was not material that the company had executed the so-called agreement on its part by building the road. It proceeded on its own motion and at its own peril. There was no agreement made with the town; for it was necessary to secure the consent of the voters, who are the contracting party in its behalf, and the supervisors are simply agents of the town to carry out an agreement duly authorized.

Rochester *vs.* Alfred Bank, 13 Wis., 432.
Lawson *vs.* Schelling, 33 Wis., 294.

The town in its corporate capacity has received nothing and withholds nothing. It has been guilty of no laches, has waived nothing, and there is no estoppel.
281 It represents the public and is itself entitled to be protected against the unauthorized acts of its own officers, when it can be done without injury to third parties.

Thomas *vs.* Richmond, 12 Wall., 356.
Town So. Ottawa *vs.* Perkins, 94 U. S., 261.

2. In our opinion the recitals in the bonds were sufficient to put the purchasers, Marshall & Ilsey, or others upon inquiry as respects the authority under which such bonds were entitled to be issued and the manner in which they were in fact issued. As we construe the bond, therefore, all purchasers are chargeable with notice of the invalidity thereof by the recitals.

3. Marshall & Ilsey, however, brought suit upon the coupons of these bonds as they matured and recovered thereon in the circuit court of the U. S. for the district of Minnesota in a sum less than $5,000, and the bonds have been duly adjudged and determined in a trial upon the merits in that court to be valid in their hands.

For the purposes of this case, we are unable to see that it is material for us to inquire into the particular grounds of the de-
282 cision of that court, as the result of the judgment is in any event to make the bonds valid, negotiable securities, held by Marshall & Ilsey as *bona fide* purchasers.

In other words, it is sufficient to say that court differs with this court upon the question of the validity of the bonds, and accordingly adjudges the holders entitled to recover thereon and notwithstanding the recitals therein.

The result would be the same if that court had differed with this court on questions of fact resting upon evidence *de hors* the bonds, as to their execution or the *bona fides* of their transfer to the present holders and, the Plainview Co. and defendant not having been parties to that action, this plaintiff is not estopped from litigating the question involved in this case in the State courts.

The judgment of the circuit court cannot be reviewed or modified by the State courts, and it is not questioned, as we believe, in this case that the result of the decision and judgment of the circuit court is to fix irrevocably the liability of the town for the whole amount of the indebtedness evidenced by the bonds.

Beloit *vs.* Morgan, 7 Wallace, 619.

283 It must therefore be deemed to have been conclusively settled that the bonds have been transferred to parties in whose hands they have become valid and legal obligations against the plaintiff town.

On the other hand, it was also conclusively determined that the bonds were void in the hands of the Plainview Co. by the judgment of this court in the Harrington case. Upon that question the Plainview Co. had its day in court in the case referred to, and the issuance and disposition of the bonds must be treated by the State courts as unlawful and wrongful, and it is immaterial that the agents of the company entertained mistaken views of their legal rights in the premises.

Comstock *vs.* Hier, 73 N. Y., 275.

If it be conceded that these bonds, when once placed on the market, were liable to pass into the hands of purchasers who would be entitled to enforce the same as valid negotiable securities in the U. S. courts, as the result in this case has proved, it must nec-

essarily follow, we think, that plaintiff has a cause of action for damages. Of course, the extent of the injury would depend upon the result of the negotiation of the securities, and in any particular case courts might differ in their determination of the
284 question whether or not the purchasers were *bona fide* holders, evidence upon either *de hors* or appearing on the face of the instruments.

If these bonds had not indicated the provisions of the statute under which they were issued the plaintiff would have been entitled to an injunction to restrain the negotiation thereof, and if negotiated in the same manner as they have been and purchased by the same parties plaintiff's right of action for the face value of the bonds and interest would be unquestioned.

Comstock *vs.* Hier, *supra.*

Thayer *vs.* Manley, 73 N. Y., 308.

But in their practical results the case supposed and the case at bar are alike. The Plainview Co. transferred the same for full value in payment for moneys advanced for building the road and Marshall & Ilsey paid nearly par for them. They were treated by all parties as valuable commercial securities, placed on the market and sold, and enforced as such against the defendant.

285 If the bonds are invalid and the Plainview Company acquired no title to them as obligations of the towns, upon what principle can it claim to be entitled to the proceeds as its property? In Comstock *vs.* Hier, *supra*, the court say: "It would be illogical, conceding the invalidity of the note in the hands of the defendants and the non-liability of the plaintiff to them, to hold that the defendants would acquire a title to the proceeds of the note by a transfer of the same to a third person. A party cannot fortify his title to property by a sale, as the title to proceeds upon sale will be the same as to the property before sale.

I am of opinion that the plaintiff had an election of remedies, trover, for the conversion of the note or an action for money had and received for the amount which the defendants realized upon the sale of the note. This follows from the conceded rule that the defendants were without title to the note or authority to dispose of the same."

286 In Chitty on Bills, 251, the author says: "Where a note or bill was void in its creation the party entitled to the instrument may maintain an action of detinue or trover to recover the same or its value or assumpsit for money had and received if the proceeds of the bill have been received."

And in Lamb *vs.* Clark, 5 Pick., 197, the court say: "There are cases where a party may have an election of remedies, as where there has been a tortuous taking of his property he may bring trespass or trover or he may waive both and bring assumpsit for the proceeds when it has been converted into money."

In such case the maker is regarded as the party entitled to the note as against the holder, whose transfer of the same is liable to work an injury to the former by imposing on him a liability which

could not be enforced by the payee, so as to validate that which was before unlawful or unauthorized.

And there appears to be no question that where a person has wrongfully obtained possession of the property of another and
287 has sold and received the money for it the real owner may waive the tort and bring an action for money had and received. He has his election to sue for a conversion or he may affirm the transaction and recover of the wrongdoer for the proceeds; in which case the title to the property sold will be confirmed in the purchaser.

Solutis pretii empionis loco habetur.

Lamb *vs.* Clark, 5 Pick., 197.

4 Wait's Ac. & Def., 472–'5, & cases.

In this case, since the Plainview Co. received the full face value of the bonds, the amount of the recovery, if any is had, would be the same in either form of action, and the allegations of the complaint and findings of fact are sufficient to support the action in either form. The title to the bonds has been confirmed in the present holders, and they have recovered or will recover the full amount thereof, and the liability of the town has been fixed through the acts of the Plainview Co. in procuring and negotiating the same, which acts this court holds to have been unauthorized
288 and wrongful. Upon what theory, then, can that corporation claim either that it should be exempted from the consequences of such acts or that it is entitled to retain the proceeds of the bonds? They are in form the bonds of the town, and were procured, held, and negotiated as its obligations, and were treated as negotiable securities and set afloat as such, and that such proceedings should result in their enforcement must be presumed to have been intended and contemplated by the company, either in their own hands or by purchasers who might occupy a more advantageous position; and it will not be permitted to object that the bonds are of no value or allege its own wrong for the purpose of defeating this action.

Comstock *vs.* Hier, *supra*, 276.

Lamb *vs.* Clark, *supra*.

Had that company brought suit upon the bonds the whole controversy would have been settled in one action; but the plaintiff is not estopped by the result of the suit of Marshall & Ilsey,
289 to which the Plainview Co. was not a party, and is not therefore concluded by the determination in that case.

4. The Winona & St. Peter R. R. is made defendant because it has purchased and succeeded to all the rights of the Plainview R. R. Co. in pursuance of Sp. Laws 1881, ch. 414, under which it was authorized to make such purchase, "subject to all demands, claims, and rights of action against said Plainview Co. arising out of the latter company's having heretofore obtained and disposed of certain bonds and coupons purporting to have been issued by the towns of Plainview and Elgin to said Plainview R. R. Co.," &c.

The purchasing company acquired the property and franchises of the Plainview Co. by virtue of that act, and of course took the

grant *cum onere* and subject to the provisions and conditions of the act.

Chicago, St. Paul, M. & O. R'y *vs.* Lindstrum, 20 M. R., 199.

We are of the opinion that the plaintiff was entitled to recover and that the order denying a new trial should be affirmed.

VANDERBURGH, *J.*

Justice Berry concurs.

290 We concur in the conclusion expressed in the foregoing opinion, but we would base the responsibility of the Plainview Company distinctly upon the following considerations:

That company having procured the unauthorized execution and delivery to itself of these bonds, in form expressing the obligation of the town, and having negotiated the same, so that they have thus come into the hands of parties who have enforced a recovery upon them by proper action in a competent tribunal, the corporation is answerable for its own unauthorized acts which have resulted in this injury to the town, unless this consequence—the recovery upon the bonds—is to be deemed too remote to afford a ground of legal liability. As respects the acts of the Plainview Company this injurious consequence is not remote, but proximate. The damage suffered by the town consists in its being compelled to pay these bonds; but that is just what the Plainview Company must be deemed to have contemplated when it negotiated for, procured, and disposed of the bonds. No other purpose or object can be ascribed to it than that, either in its own hands or in the hands
291 of future holders, the bonds should be paid by the town, voluntarily or by legal compulsion. One charged with responsibility for his own acts resulting in injury to another should not be heard to say that the injurious consequence is too remote to subject him to liability if he actually contemplated that consequence, although others might not have anticipated such a result. That the judgment by which the liability of the town to pay the bonds has been conclusivly established was erroneous does not make remote the damage thus resulting to the town, if this result—the enforcement of the bonds—was within the purpose of the company when it procured and negotiated them as the obligations of the town. It is argued that the company could not have anticipated an erroneous decision and should not be held liable for the consequences of such a decision. Probably it did not anticipate or suppose that an adjudication holding the town obligated to pay the bonds would be erroneously made, for it may have supposed the bonds to be valid
292 and rightfully enforceable; but the fact that it did not suppose that such an adjudication would be erroneous does not make remote the damage complained of. It is proximate, and liability follows because the company procured and negotiated these unauthorized securities as the obligations of the town, to be enforced

as such, and because they have been so enforced in a court having jurisdiction, as the corporation anticipated they would be.

GILFILLAN, *C. J.*
DICKINSON, *J.*

Mitchell, J., dissents.

[Endorsed:] 4633. State of Minnesota supreme court. The town of Plainview, respondent, *vs.* The Winona & St. Peter Railroad Company, appellant. Opinion & syllabus. Filed April 28, 1887. J. D. Jones, clerk. October term, 1886. Vanderburgh, J.

293 STATE OF MINNESOTA, *ss:*

I, J. D. Jones, clerk of the supreme court of the State of Minnesota, hereby certify that the above and foregoing is a full, true, and complete transcript of the record and proceedings had in the above-entitled cause between The Town of Plainview, plaintiff, and The Winona and St. Peter Railroad Company, defendant, as fully as the same remains of record and on file in my office.

And I hereby further certify that the last paper in the foregoing transcript, being the paper which immediately precedes this certificate, and which purports to be the syllabus and opinion of said supreme court of the State of Minnesota in said cause between The Town of Plainview, plaintiff, and The Winona and St. Peter Railroad Company, defendant, is a part of the record of said cause in said supreme court, and is a full, true, and correct copy of the syllabus and opinion of said supreme court in said cause on file in the office of the clerk of said supreme court, and of the only such syllabus or opinion.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court of the State of Minnesota, at my office, as clerk of said court, in the city of St. Paul, Minnesota, on this 2nd day of October, A. D. 1888.

[Seal of the Supreme Court, State of Minnesota.]

J. D. JONES,
Clerk Sup. Court, Minn.

294 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Minnesota, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Town of Plainview, plaintiff, and The Winona & St. Peter Railroad Company, defendant, wherein was drawn in question a title, right, privilege, and immunity set up and claimed under the *the* Constitution of the United States, and the decision was against such title, right, privilege, and immunity; and wherein was set up a title, right, privilege, and immunity under an authority exercised under the United States, and the decision was against the

title, right, privilege, and immunity claimed or set up under such authority; and wherein it is alleged that the decision was an impairment of the obligation of the contract in question and set up in said suit, and therefore a violation of the Constitution of the United States; and wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein
295 was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said defendant, The Winona & St. Peter Railroad Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Samuel F. Miller, the presiding justice of the said Supreme Court, the 7th day of June, in the year of our Lord one thousand eight hundred and eighty-eight.

[Seal U. S. Circuit Court, Minnesota.]

OSCAR B. HILLIS,
Clerk of the Circuit Court of the United States for the District of Minnesota.

Allowed by—
JAMES GILFILLAN,
Chief Justice of the Supreme Court, Minnesota.

296 [Endorsed:] 5163. Town of Plainview, def't in error, *vs.* Winona & St. Peter Railroad Co., pl'ff in error. Writ of error. Filed June 7, 1888. J. D. Jones, clerk.

297 The United States of America to the Town of Plainview, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Minnesota,

wherein The Winona & St. Peter Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the final judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel F. Miller, the presiding justice of the Supreme Court of the United States, this 7th day of June, in the year of our Lord one thousand eight hundred and eighty-eight.

JAMES GILFILLAN,
Chief Justice Supreme Court, Minnesota.

298 [Endorsed:] 5163. Town of Plainview, def't in error, *vs.* Winona & St. Peter Railroad Company, pl'ff in error. Citation. Filed June 19, 1888. J. D. Jones, clerk.

On this 9th day of June, in the year of our Lord one thousand eight hundred and eighty-eight, personally appeared before me the subscriber, William Burns, and makes oath that on June 8th, 1888, at Rochester, Minnesota, he delivered a true copy of the within citation to Frank B. Kellogg in person, who from the commencement of the action of The Town of Plainview against The Winona & St. Peter Railroad Company has been and still is attorney of record for said Town of Plainview in said action.

WILLIAM BURNS.

Sworn to and subscribed the 9th day of June, A. D. 1888.
[Notarial Seal, Winona Co., Minn.]

LLOYD W. BOWERS,
Notary Public, Winona County, Minn.

299 Supreme Court of the United States.

THE WINONA AND ST. PETER RAILROAD COMPANY, Plaintiff in Error,
against
THE TOWN OF PLAINVIEW, Defendant in Error.

The plaintiff in error, The Winona and St. Peter Railroad Company, hereby assigns the following errors in the above-entitled cause and court, each and all of which errors it will urge in said Supreme Court of the United States in said above-entitled cause, viz:

1st. The judgment of the supreme court of the State of Minnesota rendered in said cause against said plaintiff in error on the ninth day of May, 1888, was erroneously rendered and should be reversed, for the reason that in rendering it said supreme court of the State of Minnesota failed and refused to give full faith and credit to any of the judgments, records, or proceedings of the circuit court of the United States in and for the district of Minnesota in the several actions brought in that court by Marshall and Illsley against said town of Plainview upon interest coupons of the bonds of said town of Plainview described and referred to in the complaint in this action.

2nd. The judgment of the supreme court of the State of Minnesota rendered in the above-entitled cause against said plaintiff in error on the ninth day of May, 1888, was erroneously rendered and should be reversed, for the reason that in rendering it said supreme court of the State of Minnesota failed and refused to give such
300 faith and credit to any of the judgments, records, or proceedings of the circuit court of the United States in and for the district of Minnesota in the several actions brought in that court by Marshall and Illsley against said town of Plainview upon interest coupons of the bonds of said town of Plainview described and referred to in the complaint as such judgment, record, or proceeding would have and be entitled to by the law and usage of the United States.

3rd. The judgment of the supreme court of the State of Minnesota rendered in the above-entitled cause against said plaintiff in error on the ninth day of May, 1888, was erroneously rendered and should be reversed, for the reason that in rendering it said supreme court of the State of Minnesota failed and refused to give such faith and credit to any of the judgments, records, or proceedings of the circuit court of the United States in and for the district of Minnesota in the several actions brought in that court by Marshall and Illsley against said town of Plainview upon interest coupons of the bonds of said town of Plainview described and referred to in the complaint as such judgment, record, or proceeding would have and be entitled to by law and usage in the circuit court of the United States in and for the district of Minnesota.

4th. The judgment of the supreme court of the State of Minnesota rendered in the above-entitled cause against said plaintiff in error on the ninth day of May, 1888, was erroneously rendered and should be reversed, for the reason that in rendering it said supreme court of the State of Minnesota failed and refused to give such faith
301 and credit to any of the judgments, records, or proceedings of the circuit court of the United States in and for the district of Minnesota in the several actions brought in that court by Marshall and Illsley against said town of Plainview upon interest coupons of the bonds of said town of Plainview described and referred to in the complaint as such judgment, record, or proceeding should have and was entitled to under section 905 of the United States Revised Statutes.

5th. The judgment of the supreme court of the State of Minnesota rendered in the above-entitled cause against said plaintiff in error on the ninth day of May, 1888, was erroneously rendered and should be reversed, for the reason that in rendering it said supreme court of the State of Minnesota failed and refused to give such faith and credit to any of the judgments rendered by the circuit court of the United States in and for the district of Minnesota in the several actions brought by Marshall and Illsley against said town of Plainview upon interest coupons of the bonds of said town of Plainview described and referred to in the complaint in this action as such judgment has by law and usage in the courts of the State from which it was taken.

6th. The judgment of the supreme court of the State of Minnesota

rendered in said cause against said plaintiff in error on the ninth day of May, 1888, was erroneously rendered and should be reversed, for the reason that in rendering it said supreme court of the State of Minnesota failed and refused to give such faith and credit to
302 any of the judgments rendered by the circuit court of the United States in and for the district of Minnesota in the several actions brought by Marshall and Illsley against said town of Plainview upon interest coupons of the bonds of said town of Plainview described and referred to in the complaint in this action as such judgment should have and was entitled to under section 905 of the Revised Statutes of the United States.

7th. The judgment of the supreme court of the State of Minnesota rendered in said cause against said plaintiff in error on the ninth day of May, 1888, was erroneously rendered and should be reversed, for the reason that in rendering said judgment said supreme court of the State of Minnesota held and decided, and such judgment against said plaintiff in error was founded upon such decision, that the judgments rendered by the circuit court of the United States in and for the district of Minnesota in the several actions brought in that court by Marshall and Illsley against The Town of Plainview were each and all erroneous and contrary to law, and that this plaintiff in error was legally responsible for the rendering of such erroneous judgments and for the liability imposed upon said town of Plainview by such erroneous judgment, and that this plaintiff in error should therefore in this action be adjudged liable to said town of Plainview, as, in fact, it was adjudged liable.

8th. The judgment of the supreme court of the State of Minnesota rendered in said cause against said plaintiff in error on the ninth day of May, 1888, was erroneously rendered and should
303 be reversed, for the reason that said judgment is in contravention of article 4, section 1, of the Constitution of the United States and section 905 of the Revised Statutes of the United States with reference to the judgments rendered by the circuit court of the United States in and for the district of Minnesota in the several actions brought by Marshall and Illsley against said town of Plainview.

9th. The judgment of the supreme court of the State of Minnesota rendered in said cause against said plaintiff in error on the ninth day of May, 1888, was erroneously rendered and should be reversed, for the reason that neither the decision of the supreme court of the State of Minnesota in the case of Harrington against The Town of Plainview upon the constitutionality of section 7 of chapter 106 of the General Laws of Minnesota of 1877 (which decision is reported in volume 27 of the Minnesota Reports, page 224 *et seq.*) nor the decision of said State supreme court in this action upon the constitutionality of said section 7 of chapter 106 of the General Laws of Minnesota of 1877 could, under the Constitution of the United States forbidding the passage by a State of any law impairing the obligation of contracts, be made retroactive so as to affect the question of the validity of the bonds of the town of Plainview described and referred to in the complaint in this action or of the

contract between said town of Plainview and the Plainview Railroad Company under and in pursuance of which said bonds described in the complaint in this action were issued, and the decision and judgment of said supreme court of the State of Minnesota in this case
304 that said section 7 of chapter 106 of the General Laws of Minnesota of 1877 was in violation of the constitution of Minnesota, and so unconstitutional and void, and that for that reason the said bonds of the town of Plainview referred to in the complaint in this action and the said contract between said town of Plainview and the Plainview Railroad Company under which said bonds were issued were and are invalid, was and is an impairment of the obligation of said bonds of the town of Plainview referred to in the complaint in this action and of the contract between said town of Plainview and the Plainview Railroad Company under which said bonds were issued, and said decision and judgment in this action against this plaintiff in error were and are in violation of article 1, section 10, of the Constitution of the United States, providing that no State should pass any law impairing the obligation of contracts.

10th. The judgment of the supreme court of the State of Minnesota rendered in said cause against said plaintiff in error on the ninth day of May, 1888, was erroneously rendered and should be reversed, for the reason that said judgment in this action was and is an impairment of the obligation of the bonds described and referred to in the complaint in this action and of the contract between the town of Plainview and the Plainview Railroad Company under and in pursuance of which said bonds were issued by said town of Plainview, and said judgment was and is within the prohibition and in violation of article 1, section 10, of the Constitution of the United States, providing that no State shall pass any law impairing
305 the obligation of contracts.

11th. The judgment of the supreme court of the State of Minnesota rendered in said cause against said plaintiff in error on the ninth day of May, 1888, was erroneously rendered and should be reversed, for the reason that by the legislative enactments of the State of Minnesota existing at the time of the issue to the Plainview Railroad Company of the bonds of the town of Plainview described and referred to in the complaint in this action and at the time of the making of the contract between said town of Plainview and said Plainview Railroad Company under and in pursuance of which said bonds were so issued said bonds of the town of Plainview and said contract under which they were issued were legal and valid, and that by said judgment in this action against this plaintiff in error the supreme court of the State of Minnesota gave such force and effect to the provisions of the constitution of said State of Minnesota under which section 7 of chapter 106 of the General Laws of Minnesota of 1877 was by said supreme court of the State of Minnesota decided to be unconstitutional and void as thereby to make said provisions of the constitution of the State of Minnesota impair the obligation of the said bonds of the town of Plainview and of the contract between said town of Plainview and the Plainview Railroad Company under which said bonds were issued.

12th. The judgment of the supreme court of the State of Minnesota rendered in said cause against said plaintiff in error on the ninth day of May, 1888, was erroneously rendered and should
306 be reversed, for the reason that by the law of the State of Minnesota existing at the time of the issue to the Plainview Railroad Company of the bonds of the town of Plainview described and referred to in the complaint in this action and at the time of the making of the contract between said town of Plainview and said Plainview Railroad Company under and in pursuance of which said bonds were so issued said bonds of the town of Plainview and said contract under which they were issued were legal and valid and were existing obligations of said town of Plainview under and in accordance with the then existing laws of the State of Minnesota, and that after the issue of said bonds to the Plainview Railroad Company the constitution and statutes of the State of Minnesota were changed so that the bonds of towns could no longer legally or validly be given or issued under or pursuant to section 7 of chapter 106 of the General Laws of Minnesota of 1877, and said section 7 of chapter 106 of the General Laws of Minnesota of 1877 was made and became unconstitutional and void under the constitution of the State of Minnesota, and that by its said judgment against the plaintiff in error in this action the supreme court of the State of Minnesota gave effect to and upheld and applied said change in the constitution and statutes of the State of Minnesota so as thereby and by reason of such change in said constitution and statutes to decide and adjudge that the said bonds of the town of Plainview described and referred to in the complaint in this action and the said contract between said town of Plainview and the Plainview Railroad Com-
307 pany under and in pursuance of which said bonds were issued were illegal and invalid, and so as thereby to make said change in the constitution and statutes of the State of Minnesota after the issue of said bonds of the town of Plainview to the Plainview Railroad Company impair the obligation of said bonds and of the contract between said town of Plainview and said Plainview Railroad Company in pursuance of which said bonds were issued.

13th. The judgment of the supreme court of the State of Minnesota rendered in said cause against said plaintiff in error on the ninth day of May, 1888, was erroneously rendered and should be reversed, for the reason that by its said judgment against this said plaintiff in error the supreme court of the State of Minnesota decided, and said judgment was based upon such decision, that section 7 of chapter 106 of the General Laws of Minnesota of 1877 was unconstitutional and void because in violation of the constitution of said State of Minnesota, and that therefore the bonds of the town of Plainview described and referred to in the complaint in this action and the contract under which they were issued to the Plainview Railroad Company were invalid, though said contract was made and said bonds were so issued to the Plainview Railroad Company before said section 7 of chapter 106 of the General Laws of Minnesota of 1877 had ever been decided or adjudged to be void by any court of the State of Minnesota, and though said section 7 of chapter 106

of the General Laws of Minnesota of 1877 was a valid and
308 existing statute of the State of Minnesota at the time of the issue of said bonds of the town of Plainview to the Plainview Railroad Company and at the time of the making of the contract between said town of Plainview and said Plainview Railroad Company under and in pursuance of which said bonds were issued.

14th. The judgment of the supreme court of the State of Minnesota rendered in said cause against said plaintiff in error on the ninth day of May, 1888, was erroneously rendered and should be reversed, for the reason that by its said judgment against this plaintiff in error the supreme court of the State of Minnesota decided, and said judgment was based upon such decision, that section 7 of chapter 106 of the General Laws of Minnesota of 1877 was unconstitutional and void because in violation of the constitution of said State of Minnesota, and that for that reason the bonds of the town of Plainview described and referred to in the complaint in this action and the contract between said town of Plainview and the Plainview Railroad Company under and in pursuance of which said bonds were issued were illegal and invalid, though at the time when said bonds of the town of Plainview were so issued to the Plainview Railroad Company, and also at the time when said contract between the town of Plainview and the Plainview Railroad Company was made under and in pursuance of which said bonds were issued, said section 7 of chapter 106 of the General Laws of Minnesota of 1877 was constitutional and valid and an existing statute of the State of Minnesota under and according to the then existing decisions and adjudications of the supreme court of the State of Minnesota.

309 15th. The judgment of the supreme court of the State of Minnesota rendered in said cause against said plaintiff in error on the ninth day of May, 1888, was erroneously rendered and should be reversed, for the reason that there was drawn in question in said above-entitled cause in the supreme court of the State of Minnesota the validity of an authority exercised under the United States and the decision and the said judgment of the said supreme court of the State of Minnesota in said above-entitled cause was against the validity of such authority.

16th. The judgment of the supreme court of the State of Minnesota rendered in said above-entitled cause against said plaintiff in error on the ninth day of May, 1888, was erroneously rendered and should be reversed, for the reason that there was claimed by this plaintiff in error in said above-entitled cause in the supreme court of the State of Minnesota a title, right, privilege, and immunity under the Constitution and laws of the United States and the decision of said supreme court of the State of Minnesota and the said judgment of said supreme court of the State of Minnesota in the above-entitled action were against such title, right, privilege, and immunity.

17th. The judgment of the supreme court of the State of Minnesota rendered in the said above-entitled cause against said plaintiff in error on the ninth day of May, 1888, was erroneously rendered and should be reversed, for the reason that there was claimed by

this plaintiff in error in the supreme court of the State of Minnesota in the said above-entitled cause a title, right, privilege,
310 and immunity under a commission held and an authority exercised under the United States and the decision of the said supreme court of the State of Minnesota and the said judgment of the said supreme court of the State of Minnesota were against such title, right, privilege, and immunity.

18th. The judgment of the supreme court of the State of Minnesota rendered in said above-entitled cause against said plaintiff in error on the ninth day of May, 1888, was erroneously rendered and should be reversed, for the reason that there was drawn in question in said above-entitled cause in said supreme court of the State of Minnesota the validity of a statute of the State of Minnesota on the ground of its being repugnant to the Constitution of the United States and the decision of said supreme court of the State of Minnesota and the said judgment of said supreme court of the State of Minnesota were in favor of the validity of such statute.

THOMAS WILSON,
Attorney for the Winona & St. Peter Railroad Company, Plaintiff in Error.

311 [Endorsed:] 5163. United States Supreme Court. The Winona & St. Peter Railroad Company, plaintiff in error, *vs.* The Town of Plainview, defendant in error. Assignment of errors. Thos. Wilson, attorney for plaintiff in error. Filed Oct. 2, 1888. J. D. Jones, clerk sup. court, Minn.

Endorsed on cover: Minnesota supreme court. No. 1225. The Winona & St. Peter Railroad Company, plaintiff in error, *vs.* The Town of Plainview. Filed October 8, 1888.

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JAMES H. McKENNEY.
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Supreme Court of the United States.

OCTOBER TERM, 1891.

THE WINONA & ST. PETER RAILROAD COMPANY, *Plaintiff in Error,* vs. THE TOWN OF PLAINVIEW, *Defendant in Error.*	No. 171.
THE WINONA & ST. PETER RAILROAD COMPANY, *Plaintiff in Error,* vs. THE TOWN OF ELGIN, *Defendant in Error.*	No. 172.

Brief for Plaintiff in Error.

THOMAS WILSON, and
LLOYD W. BOWERS,
Of Counsel for Plaintiff in Error.

HERALD PRINTING HOUSE, WINONA, MINN.

Supreme Court of the United States.

OCTOBER TERM, 1891.

THE WINONA & ST. PETER RAILROAD COMPANY, *Plaintiff in Error*, vs. THE TOWN OF PLAINVIEW, *Defendant in Error.*	No. 171.
THE WINONA & ST. PETER RAILROAD COMPANY, *Plaintiff in Error*, vs. THE TOWN OF ELGIN, *Defendant in Error.*	No. 172.

BRIEF FOR PLAINTIFF IN ERROR.

These two cases come to this court upon writ of error to the supreme court of the state of Minnesota. As the facts of the two actions are substantially the same, this brief will be made to cover both cases.

At the October, 1888, term of this court defendants in error filed a motion to dismiss for lack of jurisdiction. After written argument, the jurisdictional question was by order reserved for consideration with the merits. This brief will therefore treat the jurisdiction as well as the merits.

STATEMENT.

In the following statement of facts all references are made to the printed paging of the records.

The actions were brought to recover damages from plaintiff in error for the Plainview Railroad Company's transfer (which is claimed to have been wrongful) of certain railway-aid bonds issued to it by the defendants in error (the towns of Plainview and Elgin.) The ground upon which the plaintiff in error (The Winona & St. Peter Railroad Company) is claimed to be responsible for the Plainview Railroad Company's acts will appear later. The law of Minnesota, providing for and regulating the giving of municipal aid to railroads, prescribed two different modes in which such aid might be obtained. By one method the railroad's proposition for aid was accepted or rejected at an election by vote of the legal voters of the proper district; and according to the other method the municipal acceptance of the railroad's proposition was given by the filing in the proper clerk's office of a petition to the corporate authorities, asking the issue of the desired bonds, and

signed by a majority of the resident tax payers of the district. The bonds of defendants in error were issued to the Plainview Railroad Company pursuant to such petition, and not after an election by the legal voters. The parts of the statute necessary to be considered are as follows:

Section 4. Whenever any such railroad company, specified in the first section of this act, shall desire aid in the construction of its railroad from any county, town, city or village specified in said first section, it shall make and deliver to the county auditor of such county, the town clerk of such town, or the clerk of such incorporated city or village, as the case may be, a definite proposition in writing signed by the president and secretary of said railroad company, and sealed with its seal, which proposition shall contain a statement of the amount of bonds desired, the time when payable, and whether payable before maturity at the option of such municipality, the rate of interest which they shall bear, and such proposition shall contain a statement specifying when said bonds are to be delivered, with reference to the time of the entire or partial construction of said railroad, and may contain a statement that such bonds may be deposited in escrow prior to the delivery to the railroad company; and such proposition shall contain a statement that the said railroad company will in consideration of said bonds, at the election of such municipality, issue to the municipality from which it is to receive the same, such number of the shares of its capital stock as will at par value of such stock correspond with the principal sum of such bonds. In case such bonds are proposed to be deposited in escrow as aforesaid the proposition shall also state that the certificate of the stock to be exchanged therefor shall be placed with the same depository at the same time, and in that case the proposition shall set forth the full name and residence of the trustee or trustees who shall be the custodian of the stock of said company, and of the bonds of such city, village, town or county; the auditor or clerk with whom any such proposition shall be filed, shall immediately endorse thereon the date of its receipt by him, and transcribe the same

into the record book of the county, town, city or village, as the case may be, of which he is such clerk.

Section 5. The mode of arriving at such mutual agreement as is hereinbefore specified, shall be as follows:

First—Upon receiving such proposition, the county auditor of such county, the town clerk of such town, or the clerk of such incorporated city or village, as the case may be, shall immediately publish a notice of an election to be held by the legal voters of such county, town, incorporated city or village, at the usual place or places of holding elections therein, and at such time as such clerk may designate, not less than ten (10) days or more than twenty (20) days from the date of such notices, which notice shall contain a substantial statement of the proposition made by said railroad company for the issue of the bonds of such municipality, and shall notify the legal voters thereof to deposit a ballot upon which shall be written or printed the words, "For the railroad proposition," or the words, "Against the railroad proposition." And such notice shall be posted in three public places in each election precinct in the district in which aid is desired, at least seven (7) days before the day of such election, and shall also be published at least twice before such election in one newspaper in such city, village or town, if any is published therein, and if the aid is asked of a county, in one newspaper in each village and city in such county in which a newspaper is published, and if there is no newspaper published in such city, village, town or county, then such notice shall be so published in a newspaper published at the nearest place thereto in which one is published.

* * *

Fourth—If a majority of the legal voters who shall vote upon the question at any election to be held in any such county, town, city or village, in pursuance of the provisions of this act, shall, as indicated by the official returns of any such election, vote "for the railroad proposition," then such mutual agreement for the issue of bonds by such municipality and of stock by such railroad company as provided in this act, shall be deemed and considered to have been arrived at and perfected, and there-

upon such bonds and stock shall be issued and delivered by the proper officer in conformity with the true intent of such proposition and with the provisions of this act.

* * *

And provided further, that the board of county commissioners of any such county, or the board of supervisors of any such town, or the common council of any such village or city, may, in case it shall deem it for the interest of such county, town, village or city to do so, waive the issuance by such railroad company of any such stock to such county, town, village or city.

Section 6. No bonds shall be delivered to the company under such proposition until the road, branch or extension thereof, for the construction of which the aid has been granted, shall have been completed ready for the passage of cars continuously from one terminus through or to the district granting the aid, or to the nearest point in its line to such district, or from such terminus to such point as the company in its proposition shall have proposed to construct said road where the line of the road shall not lie through the district.

* * *

Section 7. Another mode of arriving at such mutual agreement shall be as follows:

First—Within three (3) months after the filing of any such proposition as is specified in the fourth (4th) section of this act with any county auditor, town clerk, or clerk of any city or village, as the case may be, the said railroad company shall cause notice to be given as prescribed in the fifth (5th) section of this act, in three (3) public places in each election precinct in the district in which aid is desired, stating that after a day named in said notice, which shall be at least five (5) days after its date, a petition to the proper authorities of such county, town, city or village will be presented to the resident tax payers of such county, town, city or village for their signatures, asking such authorities to agree to such proposition, and such petition shall be appended to a substantial copy of such proposition.

Second—If, within four months after the filing of such proposition with any such county auditor, town clerk, or clerk of any city or village, as the case may be, the said railroad company shall deliver

to such clerk a substantial copy or copies of such proposition, so filed with such petition to the proper authorities of such county, town, city or village, asking such authorities to agree to such proposition appended thereto, bearing the signatures of a majority of the persons residing in such county, town, city or village, who were assessed for taxes upon real or personal estate in such county, town, city or village, as the case may be, as shown by the last assessment roll of the district of which aid is desired, which signatures shall be verified by the affidavit of some person witnessing such signatures; then such mutual agreement for the issue of bonds by such municipality and of stock by such railroad company shall be deemed and considered to have been arrived at and perfected, and thereupon such bonds and stock shall be issued and delivered in conformity with the true intent and meaning of such proposition, and with the provisions of this act.

Minnesota Session Laws of 1877, Ch. 106, Sections 4, 5, 6 and 7; also found in General Statutes of Minnesota of 1878, Ch. 34, Sections 95 to 98.

All the steps required to make the statutory agreement for the issue of bonds were taken; and the railroad was built by the Plainview Company in season and in full compliance with the statute and with the contract under it for issue of the municipalities' bonds. It is stipulated in both cases, and the trial court found:

That the terms and provisions of the statute under which said bonds were issued were in all respects performed and complied with by the said Plainview Railroad Company, and that the proposition submitted under said statute was in all respects complied with, and that said Plainview Railroad Company had, prior to the issuance of said bonds, earned and become entitled to the same, if the law authorizing their issue was constitutional.

Plainview Record, pp. 57, 146; Elgin Record, pp. 67, 126.

The Plainview Railroad Company's proposition had been for the issue of $50,000 of bonds by the Town of Plainview, and of $40,000 of bonds by the Town of Elgin, in return for construction of the entire road and commencement of its operation during the year 1878. (*Plainview Record, pp. 8, 145; Elgin Record, pp. 8, 125.*) And beside the finding of the trial court just quoted, it is further found as a fact that:

> Said Plainview Railroad Company constructed its railroad and had its cars running thereon and performed the several acts on its part as in said proposition stated, except that the railroad company never issued to the town of Plainview [or Elgin] any stock of the said company and never tendered or offered to issue the same.
>
> *Plainview Record, p. 146; Elgin Record, p. 126.*

No stock was given the towns for the reason that the corporate officers, as permitted to do by the statute, had elected not to take, and had waived the issue of, any such stock. (*Plainview Record, pp. 11, 146, 148; Elgin Record, pp. 10, 11, 126, 128.*)

After a full compliance as aforesaid on the part of the railroad company the board of supervisors of the said towns respectively adopted resolutions reciting such compliance and authorizing and directing the issue of the bonds. (*Plainview Record, pages 9, 10 and 11. Elgin Record, pages 9, 10 and 11.*)

The bonds of the town of Elgin were issued without dissent by anyone. (*Elgin Record, page 129.*)

There was no dissent on the part of anyone as to the issue of the bonds of the town of Plainview until the railroad company had completed its road and in all respects complied with the proposition by it submitted to, and accepted by, the town. (*Plainview Record, pages 67 and 68.*)

After the Plainview Railroad Company had fully completed its line of railroad with the cars running thereon in the manner and within the time agreed upon, and when the town was about to issue the bonds to the company according to the agreement, an action was brought by one Harrington, a resident and tax payer of Plainview, *against the town of Plainview and its officers* and the Plainview Railroad Company to restrain the issue of that town's bonds. The claim in that action was that section 7 of chapter 106 of the laws of 1877, quoted heretofore, was unconstitutional, and proceedings and agreements under it therefore void. (*Plainview Record, pp. 67–8, 146, 147; Elgin Record, p. 127.*) The trial court rendered judgment on March 15, 1879, dismissing the action and dissolving an injunction pendente lite which had been issued. (*Plainview Record, pp. 147–8; Elgin Record, p. 128.*) In the following September the plaintiff in the action, Harrington, appealed from such judgment to the state supreme court, and on October 6, 1880, that court's decision was made, and on November 16, 1880, its judgment was given, reversing the judgment of the trial court. (*Plainview Record, pp. 84, 148; Elgin Record, pp. 37–38, 128.*)

After the judgment of the district court that the bonds might issue, and before any appeal from that judgment, no supersedeas bond having been given, the town officials of Plainview passed a resolution, ("Exhibit D" attached to the complaint) for the issue of the bonds in compliance with the former resolution, ("Exhibit C" attached to the complaint,) accepting the Plainview Railroad Company's proposition. (*See Plainview Record, pp. 9, 11.*) So the Plainview bonds were issued on March 19, 1879. (*Plainview Record, page 148.*)

A copy of the bonds of each town is given as "Exhibit E" attached to the complaints in these actions. (*Plainview Record, p. 12; Elgin Record, p. 12.*) They refer on their face to the method of their issue in the following language:

> This bond is issued in pursuance of a mutual agreement between the said town and the said railroad company, which agreement was made in accordance with the laws of the state of Minnesota and through and by a proposition made by said railroad company and duly accepted by said town upon petition therefor signed by a majority of the resident tax payers of said town, said agreement having been fully performed by the said railroad company on its part.
>
> This bond is issued in pursuance of the authority given for that purpose by the state of Minnesota and in compliance with a resolution of the board of supervisors of said town.

The bonds of both towns having thus been acquired by the Plainview Railroad Company, those of Elgin in November, 1878, and those of Plainview in March, 1879, all the bonds were sold and transferred by the Plainview Railroad Company to the

Chicago and Northwestern Railway Company in July, 1879, in payment of $90,000 advanced by the latter company for the construction of the former's road. This sum had been furnished by the Chicago and Northwestern Railway Company, a citizen of Illinois, in pursuance of a contract to do so in consideration of a conveyance to it of the Plainview road and of these bonds when issued; and this contract was made in May, 1878. (*Plainview Record, pp. 131, 132; Elgin Record, pp. 111, 112.*) By the Chicago and Northwestern Railway Company the bonds were transferred to one Thomas, a citizen of the state of Wisconsin, and by him they were transferred to Samuel Marshall and Charles F. Illsley, of Milwaukee, Wisconsin. All these transfers were made in July, 1879, and therefore before the Minnesota supreme court's decision in the case of Harrington vs. Plainview; and all the transfers were actual sales for value. (*See Plainview Record, p. 149; Elgin Record, pp. 129, 130.*)

Aside from any effect of the recitals of the bonds as notice to their takers of the law under which they were given and of their issue through petition of tax payers under section 7 of the statute, instead of election by the qualified voters of the towns, the fact is expressly found:

That said Chicago and Northwestern Railway Company and said Thomas had due notice and knowledge of all the facts and circumstances preceding and attending the issue and delivery of said bonds to said Plainview Railroad Company, ex-

cept as to the pendency of the proceedings of the suit so as aforesaid brought by said Harrington.

Plainview Record, pp. 149, 150; Elgin Record, p. 130.

Marshall and Illsley, the final recipients of the bonds, had no notice of the proceedings through which the bonds were granted, "*except as such appears upon the face of said bonds.*" (*Plainview Record, p. 150; Elgin Record, p. 130.*)

The decision of the Minnesota supreme court in rendering the judgments now brought to this court for review was express and positive that "the recitals in the bonds were sufficient to put the purchasers, Marshall and Illsley, or others upon inquiry as respects the authority under which such bonds were entitled to be issued, and the manner in which they were in fact issued. As we [the supreme court] construe the bond, therefore, all purchasers are chargeable with notice of the invalidity thereof by the recitals."

Plainview Record, p. 182; Elgin Record, p. 160.

The towns refusing to pay the interest upon the bonds, Marshall and Illsley in 1881 and afterward brought several actions against *both towns* upon interest coupons, and the United States circuit court for the district of Minnesota, in which Marshall and Illsley brought the actions through their citizenship of Wisconsin, gave judgment against the towns. (*Plainview Record, pp. 39 to 42, inclusive; Elgin Record, pp. 52, 53, 54.*) The grounds of the circuit court's decision, though their nature is probably quite immaterial in these actions, may

be learned from the opinion of the court as found in *Plainview Record, pp. 35–39; Elgin Record, pp. 47–52.*

The facts as thus far stated compose the case upon which the towns, defendants in error, have claimed in these two actions that the Plainview Railroad became liable to the towns for the amount which the towns themselves have been or will be compelled to pay to holders of the bonds. Such liability of the Plainview Railroad Company is then claimed to be imposed upon this plaintiff in error, The Winona and St. Peter Railroad Company, by the following statute, approved March 3, 1881, and referred to in brief of counsel for defendants in error:

An act to authorize the Winona and St. Peter Railroad Company to purchase the stock and to purchase or lease the property and franchises of tye Plainview Railway Company.

Be it enacted by the Legislature of the State of Minnesota:—

Section 1. The Winona and Saint Peter Railroad Company is hereby authorized to purchase the stock or to purchase or lease the property and franchises of the Plainview Railway Company; and said last named company hereby authorized to sell and convey or to lease its property and franchises to the said first named company, upon such terms as may be agreed upon by the respective boards of directors of said companies so as to make the property and franchises of the last named company a part of the property and franchises of said Winona and St. Peter Railroad Company, to be used and operated by it under its charter;

Provided, That any such purchase of the property or franchises of the Plainview Railway Company shall be made, and all such property held, by said Winona and St. Peter Railroad Company, subject to all demands, claims and

rights of action against said Plainview Railway Company, arising or growing out of the latter company's having heretofore obtained and disposed of certain bonds and coupons purporting to have been issued by the towns of Plainview, Elgin and Viola, to said Plainview Railway Company, and in taking such transfer under this act said purchasiug company shall assume all claims and demands against said Plainview Railway Company, to the extent and value only of the property and franchises so transferred.

Section 2. The Winona & St. Peter Railroad Company is hereby authorized to issue its capital stock to an amount necessary to make and complete the purchase aforesaid.

Special Laws of Minnesota for 1881, Ch. 414. Plainview Record. p. 152; Elgin Record, page 132.

On May 11, 1881, The Winona and St. Peter Railroad Company bought, and received a deed of, the franchises and property of the Plainview Railroad Company. This purchase was made by virtue of the statute just quoted, and the property obtained by plaintiff in error is found to have been of the value of $225,000. (*Plainview Record, pp. 153-154; Elgin Record, pp. 133-134.*)

The findings of the district court in these actions are contained in *Plainview Record, pp. 144–155, and in Elgin Record, pp. 124–136.*

The opinion and decision of the supreme court of Minnesota are given in *Plainview Record, pp. 179–186,* and in *Elgin Record, pp. 157-164.* The case of *Harrington vs. Town of Plainview et al.* is reported in *27 Minn. 224.* The report of *Marshall et al. vs. Town of Plainview* will be found in *8 Fed.*

Rep. 783; S. C. 3 McCrary 35. And these cases are reported below in *36 Minn. 505 and 517.*

ERRORS ASSIGNED.

The full assignment of errors will be found in Plainview Record, pages 188-194; Elgin Record, pages 167–172. Generally stated, there are two federal questions, as follows:

1. The supreme court of the state of Minnesota in rendering the judgments under review disregarded the provision of the constitution of the United States that no state shall pass any law impairing the obligation of a contract, in that it erroneously decided the contracts and bonds of the towns invalid and on that ground gave effect to the act of the Minnesota legislature, Ch. 414 of the special laws of 1881, as making plaintiff in error liable for the transfer of the bonds.

2. The supreme court of the state of Minnesota, in rendering its judgments in these cases disregarded the constitution and laws of the United States in deciding that plaintiff in error is liable to defendants in error because responsible for the consequences to the towns of the judgments of the United States circuit court in the Marshall and Illsley cases, though plaintiff in error would not have been liable but for said judgments of the circuit court.

ARGUMENT.

FIRST ERROR ASSIGNED.

With reference to the question whether the state court disregarded the constitutional provision against impairment of the obligation of a contract, we shall consider first the jurisdictional inquiry whether any such question is presented; and afterwards, separately, the merits.

THE JURISDICTION.

These actions being to enforce a liability for alleged wrongful transfer by the Plainview Railroad Company of the bonds issued to it by the towns, the validity of the bonds was obviously the first question to be determined. If the bonds were valid in the hands of the Plainview Company, their transfer, whether to a bona fide holder or not, could not be either wrongful or hurtful. And so, at the outset the court below necessarily and actually decided that the bonds were invalid.

The position of the Minnesota supreme court concerning the validity of the bonds is stated in the following extract from its opinion:

> The question of the validity of these bonds was considered and determined in the case of Harrington vs. this plaintiff and the Plainview R. R. Co., 27 Minn. R., 228, adversely to the railroad company, and that decision must be accepted, without further discussion, as the law governing this case.
>
> The bonds were not issued upon the vote of the electors of the town in pursuance of laws 1877, ch. 106, sec. 5, but in pursuance of sec. 7 of that act, upon a petition of the majority of the tax payers. The

proceedings to procure such bonds were initiated and prosecuted by the railway company under the act by filing with the town clerk its proposition in writing for the issuance to it of the bonds of the town, as provided by section 4, and thereafter in securing and filing the petition of the tax payers, as directed by section 7.

Plainview Record, p. 180; Elgin Record, p. 158.

Such being the actual decision and ground of decision in regard to the validity of the bonds of defendants in error, how is there presented a question under the constitutional prohibition of any impairment by a subsequent law of the obligation of a contract? The answer is that the state court, in consequence of its decision that the bonds were invalid, gave effect to the act of March 3, 1881, (quoted on p. 12, ante,) and held that that act made plaintiff in error liable to the towns.

Three things are indisputable, and are sufficient to show the decision, both necessarily and actually, by the court below of the federal question now presented,—

1. Plaintiff in error could not be, and was not, held liable under the act of 1881 for any other reason than that the agreements of the towns under which the bonds were issued, and the bonds themselves, were declared invalid. That is, the decision below was that there was no valid contract between the towns and the Plainview Railroad Company, plaintiff's predecessor, and that therefore the act of 1881 should be given effect. This act, it must

be remembered, did not purport to make plaintiff in error liable to the towns unless the Plainview Railroad Company would have been. (See act, p. 12 ante; Plainview Record, page 152.)

2. Also, even if the bonds were invalid and the Plainview Railroad Company liable for their transfer, yet this plaintiff in error was not itself subject to that liability except under the statute of 1881. It was this act, and it only, which charged plaintiff in error with its predecessor's liability to the towns; and this act was the only ground upon which the Minnesota supreme court actually put plaintiff in error's responsibility, saying:—

> The Winona & St. Peter R. R. is made defendant because it has purchased and succeeded to all the rights of the Plainview R. R. Co. in pursuance of Sp. Laws 1881, ch. 414, under which it was authorized to make such purchase, "subject to all demands, claims, and rights of action against said Plainview Company arising out of the latter company's having heretofore obtained and disposed of certain bonds and coupons purporting to have been issued by the towns of Plainview and Elgin to said Plainview R. R. Co.," etc.
>
> The purchasing company acquired the property and franchises of the Plainview Company by virtue of that act, and of course took the grant *cum onere* and subject to the provisions and conditions of the act.
>
> *Plainview Record, pp. 184–5; Elgin Record, p. 163.*

3. Not only, as just shown, did the court below actually base the liability of plaintiff in error upon the express proviso of the act of 1881 that plaintiff in error should be liable for the Plainview Com-

pany's liabilities, but such express proviso of this act was the only possible basis of imposing such liabilities upon plaintiff in error.

Purchase of all the property and franchises of one corporation by another corporation or by a natural person does not make the purchaser responsible for the selling company's debts.

Hoard vs. Chesapeake & Ohio Ry. Co., 123 U. S. 222.
Vilas vs. R. R. Co., 17 Wis. 498.
Gilman vs. R. R. Co., 37 Wis. 317.
City of Menasha vs. R. R. Co., 52 Wis. 414.
Cook vs. R. R. Co., 43 Mich, 349.
Taylor on Corporations, §415.

Nor was the Plainview Company's franchise to be a corporation sold under the act of 1881 to plaintiff in error. Several considerations establish this:—

(a) Authority to a railroad to sell or mortgage its "property or franchises" does not include the franchise to be a corporation.

Memphis & Little Rock R. R. Co. vs. Railroad Commissioners, 112 U. S. 609.
Willamette Mfg. Co. vs. Bank of British Columbia, 119 U. S. 191, 197.
Ohio Central R. R. Co. vs. Central Trust Co., 133 U. S. 83, 92.
Coe vs. R. R. Co., 10 Ohio St, 372.
Atkinson vs. R. R. Co., 15 Ohio St. 21.

Hall vs. Sullivan R. R. Co., 21 Law Reporter 148; S. C., 2 Redfield's Am. Ry. Cases 621, (Curtis J., at Circuit.)

Wright vs. R. R. Co., 25 Wis. 46, 53.

Eldridge vs. Smith, 34 Vt. 484.

Cook vs. R. R. Co., 43 Mich. 349.

City of Menasha vs. R. R. Co., 52 Wis. 414.

Chaffe vs. Ludeling, 27 La. Ann. 607.

2 Morawetz on Corporations (2nd Ed.) §936.

(b) Authority to sell corporate "property and franchises" includes only those franchises which are essential or incidental to the use of the property conveyed.

Morgan vs. Louisiana, 93 U. S. 217.

New Orleans etc. R. R. Co. vs. Delamore, 114 U. S. 501, 507-510.

2 Morawetz on Corporations (2nd Ed.) §934.

(c) Aside from general principles, the particular language and provisions of this act of 1881 make it plain that the Plainview Company's franchise to be a corporation was not transferred to plaintiff in error.

1. The act authorizes a purchase of the Plainview Company's stock or a purchase or lease of its property and franchises. A purchase of the stock would leave the Plainview Company still in existence as a corporation; and, still more, its corporate existence would continue, if its stock were not transferred. The sale of the property and franchises did

not include the capital stock. The stockholders and their stock still existed. The transaction simply resulted in changing the character of the corporate property from a railroad to the price paid on the sale.

2. The property and franchises are permitted to be sold or *leased*. Evidently the same franchises were permitted to be leased that could be sold. Could the franchise to be a corporation be leased?

3. The property and franchises sold are declared to become a part of the property and franchises of said Winona & St. Peter Railroad Company, "*to be used and operated by it under its charter.*" Two things are important in this language. First, a franchise to be a corporation cannot be said to be "used and operated." Second, the property and franchises conveyed are to be used and operated "*under its charter,*" *i. e. the charter of the Winona & St. Peter Railroad Company.*

It is perfectly manifest that the Plainview Company's franchise to be a corporation is not included in its "property and franchises" referred to in the act. Even if it were, however, the responsibility of plaintiff in error for the Plainview Company's liabilities would none the less be the creation of this statute of 1881. If a statute in terms permits a corporation to transfer its franchise to be a corporation, the transaction is really a surrender of such franchise and the creation by the statute of a

new like franchise in the company spoken of as transferree.

2 Morawetz on Corporations (2nd Ed.) §§924–928.

Memphis etc. R. R. Co. vs. Railroad Commissioners, 112 U. S. 609, 622.

Chesapeake & Ohio R. R. Co. vs. Miller, 114 U. S. 176.

State vs. Sherman, 22 Ohio St, 411, 428.

Atkinson vs. Marietta etc. R. R. Co., 15 Ohio St. 21.

In any event therefore the plaintiff in error's liability for demands against the Plainview Railroad Company is the creation of the statute of 1881.

It thus appears that the state court in these cases both actually and necessarily gave effect to the statute of 1881 as imposing upon plaintiff in error a liability to the towns, and it gave the statute such effect because it decided the bonds of the towns, issued in 1878 and 1879, and the agreements under which they were issued, made in 1878, invalid and having neither existence nor effect as contracts.

The question of impairment of the obligation of the town's contracts through the effect given by the court below in these cases to the act of 1881 exists none the less because the decision of the Minnesota supreme court was that the contract was void and therefore the subsequent statute to be given effect—rather than the converse, that because of the effect to be given the later statute the contract could not be upheld. It is not necessary, in order that a subse-

quent statute shall impair a previous contract's obligation, that the statute should itself be made the reason for declaring the contract invalid or for restricting the contract's full and proper operation. Even if, as here, the state court declares the contract invalid on grounds independent of the later statute, still if the declared invalidity of the contract, though placed upon such independent or general grounds, is made the reason for giving the subsequent statute an effect which it could not have but for the contract's invalidity, the contract is impaired by the later act. The essential thing is only that the subsequent act be given an effect which it cannot properly have if the contract is valid. *An inconsistency between the subsequent statute, as judicially given effect, and the rights growing out of the contract, correctly construed, makes a case of impairment of the obligation of the contract.*

This court has often and clearly announced the law as stated.

Bridge Proprietors vs. Hoboken Co., 1 Wall, 116, 144—5.

Delmas vs. Merchants Ins. Co., 14 Wall, 661.

University vs. People, 99 U. S. 309.

Wright vs. Nagle, 101 U. S. 791, 793—4.

Louisville Gas Co. vs. Citizens' Gas Co., 115 U. S. 683, 696—9.

Southwestern R. R. Co. vs. Wright, 116 U. S. 231.

Vicksburg &c. R. R. Co. vs. Dennis, 116 U. S. 665, 667.

Given vs. Wright, 117 U. S. 648.

Chicago etc. R. R. Co. vs. Guffey, 120 U. S. 569, 570.

Hoadley vs. San Francisco, 124 U. S. 639, 645.

New Orleans Water Works vs. La. Sugar Co., 125 U. S. 18, 38.

Yazoo & Miss. Valley R. R. Co. vs. Thomas, 132 U. S. 174.

The result of all the cases is that the federal question whether the obligation of a contract has been judicially allowed to be impaired by a subsequent statute is composite, and includes the two questions, (1) whether the asserted contract right exists, and (2) whether, if it does, the effect given to the statute interferes with that right. If the state court upholds the statute against the asserted right, whether through a decision of one or the other question, a case is made for writ of error to this court; and this court will determine for itself both branches of the general inquiry.

Nor is it material in these cases that the act of March 3, 1881, which plaintiff in error claims has been allowed to impair the contract with the towns, defendants in error, does not purport to have any effect unless there was, independently of it, an existing liability of the Plainview Railroad Company to the towns. This subsequent statute was *in fact* given the effect of making plaintiff in error liable to the towns in these actions. Upon the statute alone,

as we have seen, the court below pronounced plaintiff in error under a liability, which but for the statute would not have fallen upon plaintiff in error, even if it had existed against the Plainview Railroad Company. And the statute was actually permitted and adjudged to operate to make plaintiff in error liable. If, however, the contracts of the towns were valid and plaintiff in error entitled to the benefit of them as valid contracts, the actual effect of the act of 1881, given to it by the judgments below, was inconsistent with the results of the contracts.

It is the effect actually given to a statute, subsequent to a contract and claimed to impair it, which determines whether, if the contract exists, the statute does in fact impair it. The statute, as construed by the state court, and with the operation there accorded it, is what this court looks at to decide whether a contract has had its obligation impaired.

All the cases cited on page 22, above, are decisive of the jurisdiction in these cases. In *Yazoo Railroad Co. vs. Thomas, 132 U. S. 174*, even the verbal form of the subsequent statute was like the Minnesota act of 1881, in that it did not by its own terms purport to operate unless it could without impairing a contract right. The statute involved in that case was one passed in 1888, that "every railroad which has failed to pay taxes for which the same was liable, for any year for which it was so liable, *such railroad not being exempt by law or*

its charter from taxation for such years and so being liable to taxation," should be assessed and taxed. The state supreme court held that the Yazoo Company's charter, passed in 1882, gave it no exemption, and that therefore the act of 1888 applied to that company. On writ of error to this court the jurisdiction was attacked and upheld. Chief Justice Fuller said:

> "Although by the terms of the act of 1888 the taxes therein referred to were not to be levied as against a railroad exempt by law or charter, yet the supreme court held that this company is not exempt, and is embraced within the act; so that if a contract of exemption is contained in the company's charter, then the obligation of that contract is impaired by the act of 1888, which must be considered under the ruling of the supreme court as intended to apply to the company."
>
> *Yazoo & Miss. R. R. Co. vs. Thomas, 132 U. S. 174, 181, 184.*

In the cases at bar the state court gave the Minnesota act of March 12, 1881, the actual effect of making plaintiff in error liable to the defendants in error, because it held the contracts of the towns invalid; and this court therefore has jurisdiction of the question whether the state court gave the statute of 1881 the effect of impairing the obligation of valid contracts.

THE MERITS.

Were the contracts of the towns and the bonds valid? This question can need but little discussion.

The decision below that the bonds were invalid was a repetition of the decision in the case of *Har-*

rington vs. Town of Plainview, 27 Minn. 224. That case, as we shall attempt to show, stands alone and is opposed to a great mass of cases all over the country, and to the Minnesota supreme courts over previous decisions. This court will decide the validity of the bonds for itself, as the cases cited upon the jurisdiction establish, the question being whether a contract has been impaired by a subsequent statute. Even when the question is not whether a contract has been impaired by a subsequent law, if no state court decision has been made before the issue of the bonds, this court will refuse to be bound by subsequent state decisions declaring the bonds invalid, but will consider the question of their validity independently.

Anderson vs. Santa Anna, 116 U. S. 356, 362.

Township of Pine Grove vs. Talcott, 19 Wall 666, 677.

Bolles vs. Brimfield, 120 U. S. 759, 763-4.

The state court's opinion proceeds wholly upon the ground that the statute under which these bonds were issued is unconstitutional because it calls for the consent of the town through petition of a majority of the resident tax payers, instead of the legally qualified electors. The constitutional provisions on which this position is taken will be found quoted on page 231 of the Harrington case opinion.

Our argument concerning the validity of the bonds rests upon such overwhelming authority that we shall not elaborate it beyond referring to the numerous authorities in point.

1. The fundamental error of the state court, as we view it, consists in misapprehending the real office and effect of the consent of the tax payers. That consent does not constitute legislation by the town, or indeed even an act of the town; but is merely the *event* upon the happening of which the enactment of the state legislature operates through its own force as a state law. The constitutional provisions referred to do not limit the state legislature's power of legislating for towns, and do not apply at all when the statute under consideration has its force as law, not from the town's, but from the state legislature's, enactment of it. In other words, the quoted provisions of the Minnesota constitution refer, at most, only to the method of local legislation, and do not prohibit the state legislature from legislating for the town without consent of the electors.

The statute under which these bonds were issued did not confer legislative power upon the tax payers of the towns. On the contrary, it was a complete enactment of the state, requiring the issue of bonds by towns in a certain event, viz., petition by a majority of the resident tax payers. In that event the bonds issued under the enactment and authority of the state, not of the town.

Statutes like that of Minnesota, providing for the issue of municipal aid bonds on condition of the consent of electors or tax payers of the mu-

nicipality, have often been attacked as unconstitutional because a delegation of the legislative authority; but in every instance the statute has been declared not to be a delegation of the legislative power, but a complete, though conditional, state law. The following authorities all so rule.

Blanding vs. Burr, 13 Cal. 343, 357–9.

Hobart vs. Supervisors Butte Co., 17 Cal. 24.

Grant vs. Courter, 24 Barb. 232.

Bank of Rome vs. Village of Rome, 18 N. Y. 89.

Starin vs. Town of Genoa, 23 N. Y. 439.

Town of Duanesburgh vs. Jenkins, 57 N. Y. 177.

Williams vs. Duanesburgh, 66 N. Y. 129.

Town of Bennington vs. Parks, 50 Vt. 178.

Slack vs. Mayville & Lexington Ry. Co., 13 B. Mon. (Ky.) 1.

Stein vs. Mayor, 24 Ala. 591.

Moers vs. City of Reading, 21 Pa. St. 188, 202.

People vs. Salomon, 51 Ill. 37, 53.

Cincinnati, Washington & Zanesville R. R. Co. vs. Commissioners of Clinton County, 1 Ohio St. 77.

Lafayette, Muncie & Bloomington R. R. Co. vs. Geiger, 34 Ind. 185, 220–228.

Petty vs. Myers, 49 Ind. 1.

City of St. Louis vs. Alexander, 23 Mo. 483, 513, 520.

Beside the foregoing municipal bond cases, the following illustrate forcibly the validity of similar laws of conditional operation:

Lock's Appeal, 72 Pa. St. 491.

State vs. Parker, 26 Vt. 357.

People vs. Fire Ass. of Phil'a., 92 N. Y. 311.

People vs. Reynolds, 5 Gilman (Ill.) 1.

State vs. Wilcox, 45 Mo. 458.

Cooley's Constitutional Limitations (5th Ed.) 118 et. seq. (side paging.)

And in the following cases the validity of laws for the issue of municipal aid bonds in the event of petition or consent of tax payers was taken for granted:

Orleans vs. Platt, 99 U. S. 676, 680.

Pompton vs. Cooper Union, 101 U. S. 196.

Draper vs. Springfort, 104 U. S. 501.

Bernard Township vs. Stebbins, 109 U. S. 341.

Township of Bernards vs. Morrison, 133 U. S. 523.

Inhabitants of Montclair vs. Ramsdell, 107 U. S. 147.

Lane vs. Schomp, 20 N. J. Eq. 82.

Bullock vs. Curry, 2 Met. (Ky.) 171.

The act under which these bonds issued being thus seen in its true light as a law of the state requiring their issue in a certain contingency, and the petition of the tax payers not being the legislative authority for the issue of the bonds, but

only the event upon the happening of which the general statute took effect, the validity of that statute is plain beyond dispute.

2. Both the courts of other jurisdictions and the Minnesota supreme court itself hold that the legislature can peremptorily require a town to issue railroad aid bonds; and, if so, it necessarily follows that the legislature can require their issue in any event or contingency that it sees fit. The power to unconditionally require their issue certainly includes the power to determine in what case they shall be issued.

Mr. Justice Strong, speaking for this court in *Railroad Co. vs. County of Otoe, 16 Wall. 667,* said:

> The second question upon which the circuit court divided was "whether the county commissioners of Otoe county could, under the act of February 15, 1869, lawfully issue the bonds from which the coupons in suit were detached, without the proposition to vote the bonds for the purpose indicated, and also a tax to pay the same being or having been submitted to a vote of the people of the county, as provided by the act of the Territorial legislature of Nebraska, passed January 1, 1861."
>
> This question we answer in the affirmative. If the legislature had power to authorize the county officers to extend aid on behalf of the county or state to a railroad company, as we have seen it had, very plainly it could prescribe the mode in which such aid might be extended, as well as the terms and conditions of the extension, and it needed no assistance from a popular vote of the municipality. Such a vote could not have enlarged legislative power." (P. 677.)

The same point is ruled in:

Thompson vs. Lee County, 3 Wall. 527.

Thompson vs. Perrine, 103 U. S. 806, 817–818.

People vs. Mitchell, 35 N. Y. 551.

The Town of Duanesburgh vs. Jenkins, 57 N. Y. 177.

Town of Bennington vs. Park, 50 Vt. 178, 199, 204–5.

Cape Girardeau County Court vs. Hill, 118 U. S. 68, 71.

And in Minnesota, by the following cases:

Guilder vs. Town of Otsego, 20 Minn. 74.

Guilder vs. Town of Dayton, 22 Minn. 366.

Davidson vs. Ramsey County, 18 Minn. 482.

In the first of these cases the legislature ordered the erection of a bridge between two counties and required the cost to be paid by the counties and the towns at the ends of the bridge in specified proportions. The act was held valid; and the court said, among other things:

"The other objection is that the act in question infringes §5 of article 11 of our constitution. This section declares that "any county and township organization shall have such powers of local taxation as may be prescribed by law." While it authorizes the legislature to confer such power of local taxation as it may see fit, and authorizes the counties and towns to exercise the power which may be conferred, it does not inhibit or exclude the legislature from directing a county or town to make a needed public improvement (like the bridge in this case) and to pay for the same by taxation. So far as any question of the power of local taxation is involved, this would be a case in which the right to exercise the power (in the sense of determining the purposes for which taxation shall be levied and the amount thereof) was withheld from, and not con-

ferred upon, the town of Otsego, and therefore remained with the general legislative authority." (Pages 78–9.)

We thus see that on authority both in Minnesota and elsewhere the legislature can absolutely require municipal aid to railroads by a town. *A fortiori*, it can require such aid in any specified event. The Minnesota legislature could have required the issue of the bonds to the Plainview Company by these towns without petition of tax payers. Could it not so require, then, if the tax payers did petition?

3. There is nothing peculiar in the provisions of the Minnesota constitution cited in the Harrington case. Equivalent provisions are found in the constitutions of most, perhaps all the states. Indeed, if sections 3, 4 and 5 of article 11, (entitled, "Counties and Townships,") were not in the state constitution, the legislature would have the same privilege of creating municipal corporations and towns and conferring powers of local taxation.

Judge Cooley says: "The right of the legislature, in the entire absence of authorization or prohibition, to create towns and other inferior municipal organizations, and to confer upon them the powers of local government, and especially of local taxation and police regulation usual with such corporations, would always pass unchallenged."

Cooley on Constitutional Limitations (5th Ed.) p. 191 (star paging.)

Houghton vs. Austin, 47 Cal. 646, 656.

The other parts referred to in the Harrington

case are sections 1 and 6 of article 7, (entitled "Elective Franchise.") They prescribe who shall be entitled to vote at "any election * * * for all officers that now are or hereafter may be elective by the people;" that "all elections shall be by ballot except for such town officers as may be directed by law to be otherwise chosen." These are regulations of elections, but they do not say when an election shall be necessary for any purpose. They seem to relate exclusively to elections of officers. At any rate, they have not the least bearing upon the question whether a local election is a necessary prerequisite to the power of the state legislature to require the issue of bonds by towns in aid of a railroad.

It may safely be affirmed that substantially similar provisions are found in the constitutions of the many states where such laws as that of Minnesota for municipal aid to railroads have been held valid; and unless all the courts have misapprehended the question, these constitutional provisions have no relevancy whatever.

4. These bonds are valid also for the reason that when they were issued, the statute and section under which they were issued were held by the supreme court of Minnesota to be a valid law, and these bonds cannot be affected by a change of decision upon that point made after their issue.

This court has often said that the "sound and true rule is that if the contract when made was valid by the laws of the state as then expounded by all de-

partments of the government and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of legislation or decision of its courts altering the construction of the law."

Gelpcke vs. City of Dubuque, 1 Wall. 206.
Havemeyer vs. Iowa City, 3 Wall. 303.
Chicago vs. Sheldon, 9 Wall. 50, 55.
Olcott vs. Supervisors, 16 Wall. 678, 690.
Township of Pine Grove vs. Talcott, 19 Wall. 666, 677.
Douglas vs. County of Pike, 101 U. S. 687.
Anderson vs. Santa Anna, 116 U. S. 356.

This doctrine is not limited to cases where the bonds have come into the hands of bona fide purchasers, but applies equally in favor of the original taker. Beside the above cases, see

Taylor vs. Ypsilanti, 105 U. S. 60.

We have, therefore, only to consider the state of the Minnesota decisions when these bonds issued. The validity of the law had not then been in any way denied; and, on the contrary, the cases of *Guilder vs. Town of Otsego*, *Guilder vs. Town of Dayton*, and *Davidson vs. Ramsey County* (cited above) all were inconsistent with the doctrine of the law's invalidity first advanced, after all these bonds issued, in the Harrington case.

In still another case, *State vs. Town of Highland, 25 Minn. 355*, decided in 1879, which was two months before the Town of Plainview's bonds

were issued, the Minnesota supreme court recognized the validity of the law. Bonds of the town of Highland had been voted *under this very section of the law*, to the relator (Midland Railway Company), and the town having declined to issue them an alternative writ of mandamus was issued to compel their issue. The legal right of the relator to the bonds was therefore the question before the court. The *report* does not show whether the question of the unconstitutionality of this section of the law was presented to the court as a ground why the mandamus should not issue, but we have taken the pains to confer with and examine the briefs of counsel for the respondent, and find that *this very point was made* in the brief and on the argument. And Mr. Justice Berry delivering the opinion of the court in that case used this language—(the italics are ours.)

"From this abstract, we think the following propositions are clearly deducible:

First, *The statute authorizes a town to aid the construction of roads.* * *

Second. The aid is to be rendered by the making of a mutual agreement between the town and the railroad company *by which the town is legally bound to issue its bonds to or for the use of the company* upon performance by the latter of its part of the agreement and by the issue of bonds accordingly.

Third. Until the mutual agreement is arrived at and perfected, as provided in section seven, *no legal liability or obligation whatever is imposed upon or incurred by the town*, in the premises. * *

As a consequence of these propositions it follows *that to be of any effect to bind a town the agreement to issue bonds must be arrived at and perfected* before the construction of the road or piece of road, the construction of which the agreement is designated to aid. * * The aid which was asked *and*

which the relator would have received and would have been entitled to receive if the agreement had been seasonably 'arrived at and perfected' would have been aid for the construction of the length of road thus proposed to be constructed."

It was this decision, too, that the United States circuit court made the basis of its decision in the Marshall and Illsley suits upon the bonds of defendants in error. (See opinion of that court on pp. 35–39 of Plainview Record; pp. 47–52 of Elgin Record.)

The Harrington case is thus seen to have been an abandonment after these bonds issued of doctrines judicially established at the time of their issue.

It has been contended by counsel for the towns in the courts below that the Harrington judgment is an estoppel in favor of the town of Plainview, concerning the invalidity of its bonds, because the Plainview Railroad Company and the town of Plainview were both defendants in that case. The answers are several:

1. The action was brought against both the town and the railroad as defendants to enjoin the issue of bonds by the former to the latter. The defendants claimed nothing against each other, but united in asserting against plaintiff the right to have the bonds issued. They were in no way "adversary parties." Instead of the right of the railroad to the bonds being controverted between it and the town,

that right was admitted by and between the two defendants.

2. The subject matter of the Harrington action was the right to issue the bonds. Before the judgment, they had already been issued and transferred by the Plainview Company to other parties. Nothing was left as a subject of controversy before the state supreme court except plaintiff's right to costs against defendants. (See Harrington opinion.)

3. No judgment was ever entered for plaintiff in the trial court. The judgment of the appellate court was one of reversal of the judgment below, and directing entry of judgment in the trial court pursuant to the opinion. (Plainview Record, p. 82.) Not only was no judgment shown to have been entered in the trial court; but it was proved affirmatively that such judgment had not been entered. (Testimony of Chas. J. Stauff, clerk of district court for Wabasha county, in Plainview Record, p. 53.) Consequently there was no judgment in the Harrington case that could be made the basis of an estoppel.

4. The state court did not consider that there was any estoppel, but decided anew in these cases, though upon the authority of the Harrington case, that the bonds were invalid. Further, the estoppel could of course not be applied in the Elgin case. Still further, even if the contracts of the town of Plainview were pronounced invalid by reason of estoppel, the second error here assigned is entirely independent of the validity of the bonds.

SECOND ERROR ASSIGNED.

Plaintiff in error was not liable to the towns for the transfer of the bonds, even if they were invalid; for the reason that the Chicago and Northwestern Railway Company, which purchased them of the Plainview Railway Company, and indeed all subsequent transferees had notice from the recitals that they were invalid; and so the Plainview Company's transfer in no way damaged the towns. The court below admitted this, but held the Plainview Company (and consequently plaintiff in error) responsible for the consequences to the towns of the judgments of the United States circuit court in the Marshall and Illsley suits. In other words, as we shall make plain, the court below held that, though the Plainview Company's act in transferring the bonds had not damaged the towns because the bonds remained none the less invalid and unenforceable in the hands of the transferees, yet plaintiff in error must be held responsible for the effects of the erroneous judgment of the circuit court that the bonds were valid.

The opinion of the court below will be found on pp. 180-186 of the Plainview Record; pp. 157-164 of Elgin Record. The *first essential* was the decision that the bonds were invalid by reason of the unconstitutionality of the law under which they were issued. Adding nothing to the cases already cited upon the merits of that point, and admitting for

present purposes the propriety of the decision that the law under which the bonds were issued was unconstitutional and that the bonds were invalid, still the liability of the Plainview Railroad Company, and therefore of plaintiff in error, to the towns would not result from such fact alone. The *second essential* of the state court's decision was that, though the bonds were invalid and though they contained such recitals as charged all takers with notice of their invalidity, yet the circuit court of the United States had erroneously made the towns liable upon the bonds by its judgments and for the consequences of such judgments the Plainview Railroad Company and plaintiff in error were responsible.

The Minnesota supreme court expressly decided that the recitals of the bonds were such as put all takers

> Upon inquiry as respects the authority under which such bonds were entitled to be issued and the manner in which they were in fact issued. As we [*the court*] *construe the bonds therefore*, all purchasers are chargeable with notice of the invalidity thereof by the recitals. (*Plainview Record, p. 182.*)

Consequently, according to the state court's decision, neither the Chicago and Northwestern Railway Company, nor Thomas, nor Marshall and Illsley, could enforce the bonds against the towns unless the Plainview Railroad Company itself could.

Under the decisions of this court also the conclusion of the state court as to the effect of the recitals in the bonds is plainly correct. We beg leave

here to again call attention to the language of the recitals of the bonds:

> This bond is issued in pursuance of a mutual agreement between the said town and the said railroad company, which agreement was made in accordance with the laws of the state of Minnesota and through and by a proposition made by said railroad company, and duly accepted by said town (*upon a petition therefor signed by a majority of the resident tax payers of said town*) said agreement having been fully performed by the said railroad company on its part.
>
> This bond is issued in pursuance of the authority given for that purpose by the laws of the state of Minnesota and in compliance with a resolution of the board of supervisors of said town,

It will be seen that all of the above recital down to that part enclosed in brackets is merely of such facts, or legal conclusions, as every one dealing in the bonds was bound at his peril to take notice of, for

> Even a bona fide holder for value without notice before maturity of a municipal bond is bound to show legislative authority in the issuing body to create the bond,
>
> *Hayes vs. Holly Springs, 114 U. S. 126.*

No bond could be legally issued except upon a proposition accepted by the town. As to that no recital was needed. But the statute having provided that the proposition must be accepted in one of two ways, that part of the recital enclosed in brackets shows most conclusively in which one of these ways it was accepted, i. e. "*upon a petition therefor signed by the tax payers.*" If that was unconstitutional, therefore, everyone taking the bonds had notice of that fact and stood simply in the shoes

of the Plainview Company having just such rights as it had—no more, no less.

Though this proposition is hardly open to discussion, we may be pardoned for referring to a few authorities in support of it.

In *Angle vs. N. W. Mut. Life Ins. Co., 92 U. S. 341*, this court thus states the rule:

> Even the holders of negotiable securities taken in the usual course of business, before the securities fall due, are held chargeable with notice, where the marks on the instrument are of a character to apprise one to whom the same is offered of the alleged defect. (*p. 341.*)
>
> * * *
>
> If he choses to receive it under such circumstances, he takes it with all the infirmities belonging to it, and is in no better condition than the person from whom he received it. (*ib. p. 342.*)
>
> * * *
>
> Actual notice in such case is not required, even in suits founded on negotiable securities where the evidence of its infirmity consists of matters apparent on its face.
>
> * * *
>
> Constructive notice in such case is held sufficient, upon the ground that when a party is about to perform an act which he has reason to believe may affect the rights of others, an inquiry as to the facts is a moral duty, and diligence an act of justice. Whatever fairly puts a party upon inquiry in such a case is sufficient notice in equity where the means of knowledge are at hand, and if the party, under such circumstances, omits to inquire, and proceeds to do the act, he does so at his peril, as he is then chargeable with all the facts which by a proper inquiry he might have ascertained. (*ib., p. 342.*)

If the recitals in such a bond are such as to put the endorsee or purchaser upon inquiry and by a diligent prosecution of that inquiry he could ascertain the defects, he will be held to have notice of them, and he cannot enforce the payment of the bonds.

Harshman vs. Bates County, 92 U. S. 569, 575.

County of Bates vs. Winters, 97 U. S. 83, 91.

Still again the trial court found as facts:—

"That said Chicago and Northwestern Railway Company and said Thomas had due notice and knowledge of all the facts and circumstances preceding and attending the issue and delivery of said bonds to said Plainview Railroad Company, except as to the pendency of the proceedings of the suit so as aforesaid brought by said Harrington." (Plainview Record, pp. 149, 150; Elgin Record, p. 130.)

The bonds were transferred by the Plainview Railroad Company to the Chicago and Northwestern Railway Company, by the latter to Thomas, and by Thomas to Marshall and Illsley. Plaintiff in error is responsible, if at all, only for the transfer by the Plainview Railroad Company, and as its transferee had actual notice of the manner of issue of the bonds, beside being charged with notice by the recitals, it appears conclusively that the transfer for which plaintiff in error is accountable gave no greater rights than existed before the transfer, and in no way damaged the towns.

When the state court had once determined that the transferees of the bonds had no better legal position than the Plainview Railroad Company itself,

the conclusion would have necessarily followed, if there had been no judgments of the United States circuit court in existence, that the transfer of the bonds had no legal effect whatever, and a judgment would plainly have been necessitated that the towns had no cause of action for such transfer. It was the judgments of the United States circuit court in the Marshall and Illsley suits, and they alone, which could further be thought of as a possible ground for liability of plaintiff in error; and it was those judgments and their consequences which the state court in fact made the foundation of the judgments now brought here for review. The position taken by the state court was that because the circuit court had rendered judgments against the towns, and so compelled them to pay the bonds, the Plainview Railroad Company was liable for such result, even though, according to the opinion and decision of the state court itself, the circuit court's decision was wrong and the bonds were legally invalid in the hands of Marshall and Illsley as much as before any transfer. In other words, the decision of the state supreme court was that if the circuit court had not rendered the judgments which it did against the towns, the plaintiff in error could not have been adjudged liable; but though the Plainview Railroad Company's transfer of the bonds had not altered the legal situation and was not in itself a ground of liability, yet the circuit court judgments *had* altered

the legal situation and plaintiff in error was responsible for the effects of those judgments.

There are five judges on the bench. One dissented from the decision in toto. Mr. Justice Vanderburgh delivered an opinion to which Mr. Justice Berry assented. The chief justice and Mr. Justice Dickinson joined in an opinion in which they expressly declared that they based the responsibility of the Plainview Company on the grounds therein stated.

The following quotations are worth making from the opinion of Justice Vanderburgh:

> Marshall and Illsley, however, brought suit upon the coupons of these bonds as they matured, and recovered thereon in the circuit court of the United States for the district of Minnesota in a sum less than $5,000, and the bonds have been duly adjudged and determined in a trial upon the merits in that court to be valid in their hands. For the purposes of this case, we are unable to see that it is material for us to inquire into the particular grounds of the decision of that court, as the result of the judgment is in any event to make the bonds valid, negotiable securities held by Marshall and Illsley as bona fide purchasers.
>
> In other words, it is sufficient to say *that court differs with this court upon the question of the validity of the bonds, and accordingly adjudges the holders entitled to recover thereon and notwithstanding the recitals therein.*
>
> *Plainview Record, p. 182.*

The last of these words directly declare that if the Marshall and Illsley cases had been brought in the Minnesota supreme court, it would have decided differently from the United States court, and in favor of the towns. If so, how could the state court adjudge plaintiff in error liable for the transfer of the

bonds *unless it held plaintiff in error liable for the reason that the United States court had made a wrong decision?*

The opinion rendered by the Chief Justice and Justice Dickinson is not less direct and unmistakable. They say:

We concur in the conclusion expressed in the foregoing opinion, but we would base the responsibility of the Plainview Company distinctly upon the following considerations:

That company having procured the unauthorized execution and delivery to itself of these bonds, in form expressing the obligation of the town and having negotiated the same, *so that they have thus come into the hands of parties who have enforced a recovery upon them by proper action in a competent tribunal,* the corporation is answerable for its own unauthorized acts which have resulted in this injury to the town, unless this consequence—*the recovery upon the bonds*—is to be deemed too remote to afford a ground of legal liability. As respects the acts of the Plainview Company this injurious consequence is not remote, but proximate. *The damage suffered by the towns consists in its being compelled to pay these bonds;* but that is just what the Plainview Company must be deemed to have contemplated when it negotiated for, procured, and disposed of the bonds. No other purpose or object can be ascribed to it than that, either in its own hands or in the hands of future holders, the bonds should be paid by the town, voluntarily or by legal compulsion. One charged with responsibility for his own acts resulting in injury to another should not be heard to say that the injurious consequence is too remote to subject him to liability if he actually contemplated that consequence, although others might not have anticipated such a result. *That the judgment by which the liability of the town to pay the bonds has been conclusively established was erroneous* does not make remote the damage thus resulting to the town, if this result—the enforcement of the bonds—was within the purpose of the company when it procured and negotiated them as obligations of the town. *It is argued that the company could not have antici-*

pated an erroneous decision and should not be held liable for the consequences of such decision. Probably it did not anticipate or suppose that an adjudication holding the town obligated to pay the bonds would be erroneously made, for it may have supposed the bonds to be valid and rightfully enforceable; but *the fact that it did not suppose that such an adjudication would be erroneous* does not make remote the damage complained of. It is proximate, and liability follows because the company procured and negotiated these unauthorized securities as the obligations of the town, to be enforced as such, *and because they have been so enforced* in a court having jurisdiction, as the corporation anticipated they would be.

Plainview Record, p. 185.

These opinions show—what would be clear even if the reasons or grounds of the decision were not stated—that the Minnesota supreme court held that but for the alleged erroneousness of the judgments of the circuit court of the United States this defendant in error or its grantor, the Plainview Railroad Company, could not be held liable, and that because of such alleged error they are liable.

Or, otherwise stated, the Minnesota supreme court has held that these federal judgments did not simply *declare* a liability that existed without and before them; but that they *created* the liability—which but for the judgments did not exist.

The fundamental question therefore arises, which is presented in the second assignment of error: *Can a judgment of a circuit court of the United States, recovered without fraud, be properly given by a*

state court the affirmative effect of making a person, who but for the judgment is under no responsibility, liable for the consequences of the judgment to the judgment debtor? Or, specifically, could plaintiff in error, which but for the judgments of the circuit court in the Marshall and Illsley cases was under no liability to these towns, be properly held liable by the state court for the consequences to the towns of those federal judgments?

These questions seem to furnish their own answer. They certainly do as to the merits, if the jurisdiction exists to consider them here. The following argument relates primarily to the

JURISDICTION.

First. It may be admitted that the Marshall and Illsley judgments are no technical estoppel in the present suits. But the error we complain of is that the state court, instead of disposing of the cases as if the Marshall and Illsley judgments had not been recovered, gave them the affirmative and unjustifiable effect of subjecting plaintiff in error to a liability which otherwise did not exist.

So far from disposing of these cases as if the Marshall and Illsley judgments had not been rendered or were a correct adjudication of the rights of the parties, the court below held them not only to be erroneous, but also to have given the defendants a right of action

against the plaintiffs for the damage alleged to have resulted from their rendition and execution.

This court, by Mr. Justice Matthews, declared the rule concerning the proper effect of federal judgments as follows:

"Section 905, Rev., Stat., which embodies the orginal act of May 26, 1790, c. 11, and the supplement thereto of March 27, 1804, c. 56, provides that the records and judicial proceedings not only of the courts of any state, but also of any territory, or of any country subject to the jurisdiction of the United States, authenticated as therein prescribed, 'shall have such faith and credit given to them, in every court within the United States, as they have by law or usage in the courts of the state from which they are taken;' which, by supplying the ellipsis, must be taken to mean such faith and credit as they are entitled to in the courts of the state, territory, or other country subject to the jurisdidtion of the United States from which they are taken.

So far as this statutory provision relates to the effect to be given to the judicial proceedings of the states, it is founded on article 4, section 1, of the constitution, which, however, does not extend to the other cases covered by the statute. The power to prescribe what effect shall be given to the judicial proceedings of the courts of the United States is conferred by other provisions of the constitution, such as those which declare the extent of the judicial power of the United States, which authorize all legislation necessary and proper for executing the powers vested by the constitution in the government of the United States, or in any department or officer thereof, and which declare the supremacy of the authority of the national government within the limits of the constitution. As part of its general authority, the power to give effect to the judgments of its courts is co-extensive with its territorial jurisdiction. That the supreme court of the District of Columbia is a court of the United States, results from the right of exclusive legislation over the District which the constitution has given to congress. Accordingly, the judgments of the courts of the United States have invariably been recognized as

upon the same footing, so far as concerns the obligation created by them, with domestic judgments of the states, wherever rendered and wherever sought to be enforced."

Embry vs. Palmer, 107 U. S., 3, 9.

Crescent City Live Stock Co. vs. Butchers' Union, 120 U. S. 141, 146-7.

Second. The question of the proper effect to be given in any case to a federal judgment is therefore federal. It arises upon and is determined by the federal statute prescribing such effect. In *Crescent City Live Stock Co. vs. Butcher's Union*, supra, Justice Matthews again said:

"It is argued by counsel for the defendant in error that this does not embrace any federal question; that the effect to be given to a judgment or decree of the circuit court of the United States sitting in Louisiana by the courts of that state is to be determined by the law of Louisiana, or by some principle of general law as to which the decision of the state court is final; and that the ruling in question did not deprive the plaintiffs in error of 'any privilege or immunity specially set up or claimed under the constitution or laws of the United States.' But this is an error. The question whether a state court has given due effect to the judgment of a court of the United States is a question arising under the constitution and laws of the United States and comes within the jurisdiction of the federal courts by proper process, although, as was said by this court in *Dupasseur vs. Rochereau, 21 Wall. 130*, 135, 'no higher sanctity or effect can be claimed for the judgment of the circuit court of the United States rendered in such a case, under such circumstances, than is due to the judgments of the state courts in a like case and under similar circumstances.' *Embry vs. Palmer, 107 U. S. 3.* It may be conceded, then, that the judgments and decrees of the circuit court of the United States, sitting in a particular state, in the courts of that state are to be accorded such effect, and such effect only, as would be accorded in similar

circumstances to the judgments and decrees of a state tribunal of equal authority. But it is within the jurisdiction of this court to determine, in this case, whether such due effect has been given by the supreme court of Louisiana to the decrees of the circuit court of the United States here drawn in question." (P. 146.)

Third. The requirement that proper effect, and that only, be given to a federal judgment is not limited to cases where the judgment is an estoppel, but extends to all incidents of the judgment and to its effect in every possible way.

Embry vs. Palmer, 107 U. S. 3.

Crescent etc. Co. vs. Butchers' Union, 120 U. S. 141.

Green vs. Van Buskirk, 5. Wall. 307; and S. C., 7 Wall. 139.

Kelly vs. Crapo, 16 Wall. 610.

Factors etc. Ins. Co. vs. Murphy, 111 U. S. 738.

In *Embry vs. Palmer* the question was concerning the sufficiency of the showing for equitable relief against the judgment. In *Crescent Co. vs. Butchers' Union* the question was what effect a reversed judgment was entitled to as defense against an action for malicious prosecution. In *Green vs. Van Buskirk and Kelly vs. Crapo* the persons who were held affected by the local effect of judicial proceedings in another state were under no estoppel. (See opinion of Miller, J., on p. 311 of 5 Wall.) And in *Factor's Ins. Co. vs. Murphy* it was expressly ruled that defendant in error was not a party to the proceedings

in bankruptcy, and so there was no estoppel on anybody.

Fourth. And the rule that federal judgments shall have "such faith and credit given to them in every court within the United Stated as they have by law or usage in the court of the state [or jurisdiction] from which they are taken," equally forbids *giving a wrong effect* and wrongly giving *no* effect. Federal judgments are to have every where the *same* effect as in the federal courts. On principle this would be plain; and we also have authority.

This court has said, by Mr. Justice Field:

> "No greater effect can be given to any judgment of a court of one state in another state than is given to it in the state where rendered. Any other rule would contravene the policy of the provisions of the constitution and laws of the United States on that subject."
>
> *Public Works vs. Columbia College, 17 Wall. 521, 529.*
>
> *Suydam vs. Barber, 18 N. Y. 468.*

In the cases at bar, the Minnesota court gave to the Marshall and Illsley judgments a *positive* and *wrong* effect, viz: that of making the Plainview Railroad Company (and so plaintiff in error) liable to the towns, though but for the recovery of those judgments it would not have been liable. This it could not properly do; and the error arose through disregard of the constitution and statutes of the United States.

Fifth. The case of *Factors' and Traders' Insurance Co. vs. Murphy, 111 U. S. 738*, is, we think,

directly decisive of the jurisdiction in these cases. That was an action by defendant in error in a state court of Louisiana to foreclose a mortgage upon certain property that had been sold in bankruptcy, under order of the United States district court, free from incumbrances. At the sale of the property it was bought in by several lienors, and thereupon it was conveyed to the insurance company to hold for the lienors. Mrs. Murphy claimed that she was not bound by the order for sale free from any incumbrances, as she was not a party to the proceeding, and that all other liens than hers upon the property were extinguished because such other lienholders were parties to the sale proceeding. The state court so ruled; and thereupon a writ of error was taken to the state court.

This court decided that Mrs. Murphy was rightly held below not to have been a party to the sale proceeding and so not bound by the order of sale, but free to foreclose her mortgage; but it further held that, Mrs. Murphy not being herself bound by the order of sale, the other lienholders were not bound as against Mrs. Murphy and could assert their liens in her foreclosure action. The affirmative effect which the state court gave to the order of sale in bankruptcy, viz.: so as to discharge in Mrs. Murphy's favor all other liens than hers, was pronounced insupportable. The judgment of the state court was therefore reversed.

This cited case establishes the jurisdiction in the cases at bar for the reasons:—

1. There was no estoppel on anybody in the Murphy case.

2. The state court did not *deny* effect to the order of the United States district court, but *gave* it *improper* effect. So here, the Minnesota court gave improper effect against plaintiff in error to the Marshall and Illsley judgments.

3. Mrs. Murphy was in no way a party to the order of sale in bankruptcy; and so the order conferred no rights upon the lienholders against her, except so far as every person, *whether a party to a judgment or not*, has a right under the statutes of the United States to insist that a federal judgment shall not be given improper effect against him.

Sixth. Not only is the question federal whether the state court gave the Marshall and Illsley judgments an improper effect against plaintiff in error, but this court has jurisdiction of such federal question under U. S. Revised Statutes, Sec. 709.

The effect of a federal judgment in all respects and as concerns all the world is fixed by the statute of congress, and every man, whether a party to the judgment or not, has a right under the statute that no other effect than the law allows shall be given to the judgment as against him. The statute protects a man, not a party to the judgment, no less than a party, from having it improperly used against him.

That is everybody's "right, privilege and immunity" under the statute and laws of the United States.

Seventh. The nature and effect of federal process and proceeding are questions for determination of the United States courts.

Butz vs. City of Muscatine, 8 Wall. 575, 584.

Shape vs. Doyle, 102 U. S. 686.

Buck vs. Colbath, 3 Wall. 334.

Etheridge vs. Sperry, 139 U. S. 266.

Questions whether due effect is given in actions in state courts to bankruptcy proceedings are federal.

Boynton vs. Ball, 121 U. S. 457.

Dimock vs. Revere Coffee Co., 117 U. S. 559.

Long vs. Bullard, 117 U. S. 617.

Noble vs. Hammond, 129 U. S. 65.

New Orleans, Etc., R. R. Co. vs. Delamore, 114 U. S. 501.

Eighth. Where the effect of a federal judgment comes in question in a state court, this court will on writ of error itself determine whether proper effect has been given to it.

Plumb vs. Goodnow's Adm'r, 123 U. S. 560.

Des Moines, Etc., Co. vs. Iowa Homestead Co., 123 U. S. 552.

THE MERITS.

With reference to the propriety of holding persons liable for the recovery and consequences of judgments in the federal courts, as plaintiff in error was held liable in the court below, little need be said by us.

1. If an action for damages is permitted solely on the ground of the recovery of a judgment against a party, then that judgment is no finality, and the whole matter can be gone over indefinitely.

Chief Justice Eyre said, in

Phillips vs. Hunter, 2 H. Black, 414;

"Shall the same judgment create a duty for the recovery upon which he may have an action of debt, and a duty against him upon which an action will lie? This goes beyond my comprehension."

And Chief Justice Kent spoke aptly for this case:

"This suit is an attempt to overhaul the merits of the verdict and recovery in Connecticut. The defendant below recovered damages of the plaintiff, in that state, on a charge of fraud, in the sale of Virginia lands; and the plaintiff now alleges that there was no such fraud, and that the testimony which was produced, in support of the charge, was procured by the corrupt acts of the defendant. If this be not an effort to try over again the merits of the former recovery, I must be greatly mistaken in my view of the case. The injustice of the recovery appears to be the real *gravamen*. The declaration does, in substance, tell the defendant that he had obtained a verdict and judgment against the plaintiff, which he ought not to have done, whereby the plaintiff is injured and claims a return of the money so unjustly recovered."

Smith vs. Lewis, 3 John. 168.

He added that to commit such a recovery would be against public policy and convenience, productive of endless litigation and contrary to established precedent.

2. No maxim is more fundamental or important than "*Actus curiae neminem gravabit.*"

Borer vs. Chapman, 119 U. S. 587, 596.

The Minnesota supreme court decided in these cases that in its judgment Marshall and Illsley ought not to have been allowed to recover against the towns. Even so, plaintiff in error could not be held responsible for the circuit court's mistake in adjudging otherwise.

3. If state courts can hold persons to a liability for the doings of the federal courts, the latter no longer enjoy an independent and final authority even in their own sphere. The decisions of this court have been, and always will be, careful to maintain the federal judicial authority.

A state court cannot enjoin proceedings in a federal court, any more than the latter can enjoin proceedings in the state courts.

McKim vs. Voorhies, 7 Cranch 279.

Peck vs. Jenness, 7 How., 624, 625.

Previous injunction of a state court against an act will not prevent mandamus from a federal court to compel the act.

Mayor vs. Lord, 9 Wall., 409.

Riggs vs. Johnson County, 6 Wall., 166.

U. S. vs. City of Keokuk, 6 Wall., 514.

A state legislature can no more than a state court prevent the enforcement of a federal judgment.

U. S. vs. Peters, 5 Cranch. 115, 135–6.

Defendant in custody under *ca. sa.* from a federal court cannot be released by a state officer acting under state insolvency proceedings.

Duncan vs. Darst, 1 How. 301, 308.

4. If the Marshall and Illsley actions had never been brought and the judgments therein recovered, the opinion of the court below admits that plaintiff in error would be under no liability. The towns, however, seek to found the present actions upon those judgments and their alleged erroneousness, as causing them damage. If they rely upon the judgments at all, they cannot at the same time deny their correctness.

5. The right of the state courts, if admitted, to visit as in these cases, upon whom they will, responsibility for the recovery and consequences of judgments in the federal courts would not only degrade, but destroy, the United States courts.

THOMAS WILSON,
LLOYD W. BOWERS,
Of Counsel for Plaintiff in Error.

Parts of Minnesota Constitution Referred to in Harrington Case.

ARTICLE XI.

Section 3. Laws may be passed providing for the organization, for municipal and other town purposes, of any congressional or fractional townships in the several counties in the state; provided, that when a township is divided by county lines, or does not contain one hundred inhabitants, it may be attached to one or more adjoining townships or parts of townships for the purposes aforesaid.

Section 4. Provision shall be made by law for the election of such county or township officers as may be necessary.

Section 5. Any county and township organization shall have such powers of local taxation as may be prescribed by law.

ARTICLE VII.

Section 1. Every male person of the age of twenty-one years or upwards, belonging to either of the following classes, who shall have resided in the United States one year, and in this state for four months next preceding any election, shall be entitled to vote at such election, in the election district of which he shall at the time have been for ten days a resident, for all officers that now are, or hereafter may be, elective by the people. (Then follows a specification of the classes of persons from whom the electors are taken).

Section 6. All elections shall be by ballot, except for such town officers as may be directed by law to be otherwise chosen.

Office Supreme Court U. S.
FILED.
JAMES H. McKENNEY
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

THE WINONA & ST. PETER RAILROAD COMPANY, *Plaintiff in Error,*

vs.

THE TOWN OF PLAINVIEW, *Defendant in Error.*

THE WINONA & ST. PETER RAILROAD COMPANY, *Plaintiff in Error,*

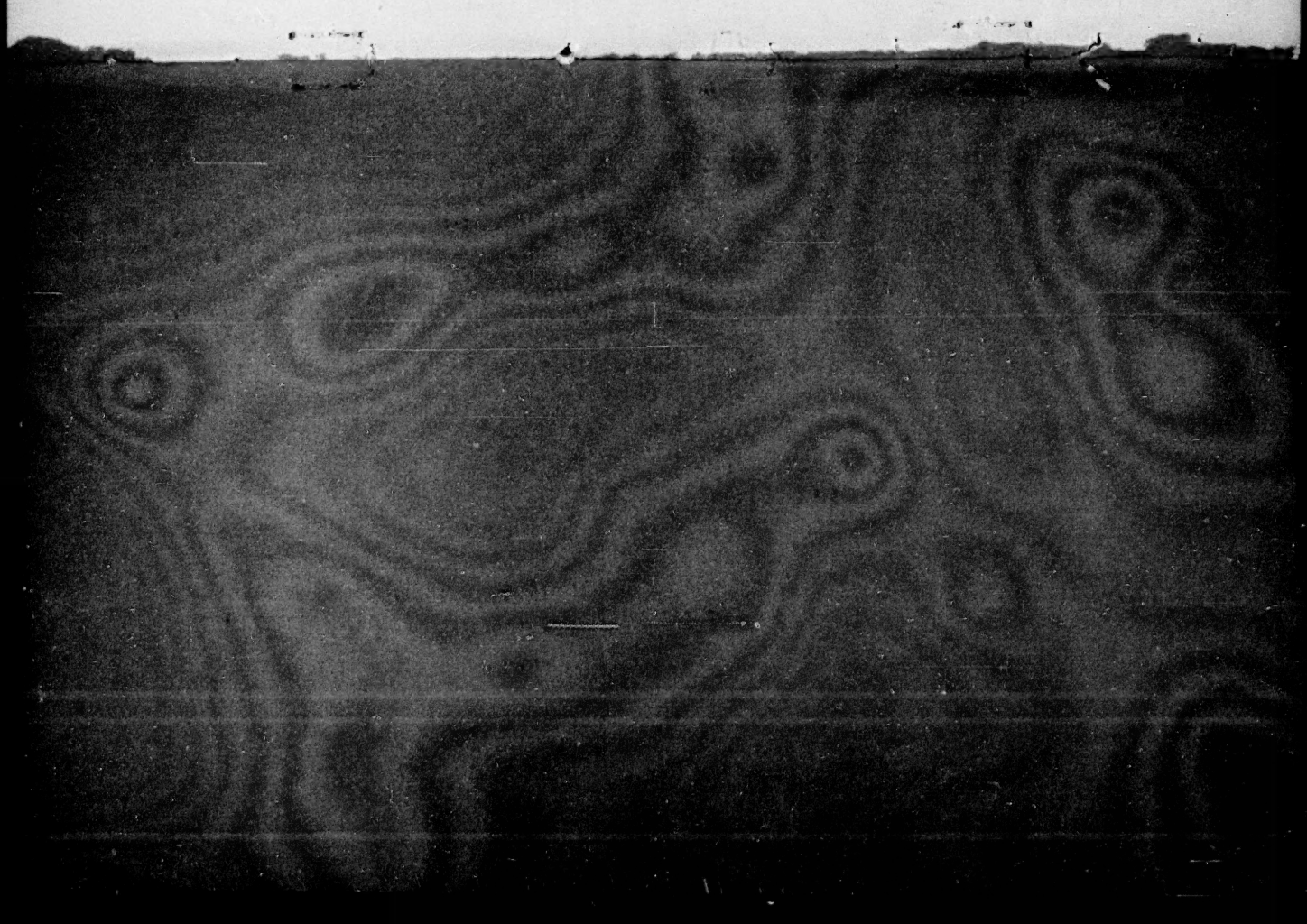
vs.

THE TOWN OF ELGIN, *Defendant in Error.*

Argument for Defendants in Error.

C. K. DAVIS,
FRANK B. KELLOGG,
Counsel for Defendants in Error.

WEST PUBLISHING CO., PRINTERS AND LAW PUBLISHERS, ST. PAUL, MINN.



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BRIEF FOR DEFENDANTS IN ERROR.

Statement.

These cases arise out of contemporaneous transactions between the Plainview Railroad Company and the towns of Plainview and Elgin, so nearly identical that they were heard and determined together in the district court and in the supreme court of Minnesota. It is proposed to submit them in the same manner here. We shall state the facts as they appear in the record of the case of the town of Plainview, and indicate such facts as to dates and amounts, etc., in the case of the Town of Elgin, as should be stated.

These towns are *quasi*-corporations under the general township laws of the state of Minnesota. They are contiguously situated in the county of Wabasha. The Plainview Railroad has its northern

terminus in the village of Plainview, in the town of Plainview, and runs thence south through the town of Elgin to the village of Eyota, a point on the Winona & St. Peter Railroad, a distance of about 15 miles. The Plainview Railroad Company and the Winona & St. Peter Railroad Company are incorporated under the laws of Minnesota.

Chapter 106 of the General Laws of Minnesota for 1877 is entitled "An act to enable municipal corporations to aid in the construction of railroads." It is provided by section 1 that any county, town, city, or incorporated village is authorized to aid in the construction of any railroad in the state of Minnesota by issuing its bonds to such railroad company not exceeding in amount ten per centum of the value of its taxable property. The municipality, at its election, is entitled to receive from the railroad company an amount of stock equal to the bonds, but may, in case it shall deem it for the interests of the same to do so, waive the issuance to it of any such stock.

It is provided that an agreement for these purposes may be arrived at in the following manner, and, when arrived at, the proper officers of the municipality shall be authorized and required to issue the bonds: Whenever any such railroad company shall desire aid in the construction of its road of any county, town, city, or village, it shall make and deliver to the county auditor of the county, or the town-clerk of the town, or the clerk of the city or village, a proposition in writing, signed by its president and secretary, containing a statement of the amount of bonds desired, time when payable, rate of interest, etc.

The statute provides for two methods of arriving at such mutual agreement. The first method is by an election to be held by the legal voters of the municipality. This portion of the statute need not be considered, for the method pursued in the present cases was not by means of any election. The other method of ariving at such mutual agreement is provided by section 7 of the statute, and is as follows:

"Sec. 7. Another mode of arriving at such mutual agreement shall be as follows:

"*First.* Within three (3) months after the filing of any such proposition as is specified in the fourth (4th) section of this act with any county auditor, town-clerk, or clerk of any city or village, as the case may be, the said railroad company shall cause notice to be given, as pre-

scribed in the fifth (5th) section of this act, in three (3) public places in each election precinct in the district in which aid is desired, stating that after a day named in said notice, which shall be at least five (5) days after its date, a petition to the proper authorities of such county, town, city, or village will be presented to the resident taxpayers of such county, town, city, or village for their signatures, asking such authorities to agree to such proposition, and such petition shall be appended to a substantial copy of such proposition.

"*Second.* If, within four months after the filing of such proposition with any such county auditor, town-clerk, or clerk of any city or village, as the case may be, the said railroad company shall deliver to such clerk a substantial copy or copies of such proposition, so filed with such petition to the proper authorities of such county, town, city, or village, asking such authorities to agree to such proposition appended thereto, bearing the signatures of a majority of the persons residing in such county, town, city, or village, who were assessed for taxes upon real or personal estate, in such county, town, city, or village, as the case may be, as shown by the last assessment roll of the district of which aid is desired, which signatures shall be verified by the affidavit of some person witnessing such signatures, then such mutual agreement for the issue of bonds by such municipality, and of stock by such railroad company, shall be deemed and considered to have been arrived at and perfected, and thereupon such bonds and stock shall be issued and delivered in conformity with the true intent and meaning of such provision, and with the provisions of this act."

(Laws Minn. 1877, c. 106, p. 198.)

On January 31, 1878, the Plainview Railroad Company made and delivered to the town-clerk of the town of Plainview a proposition in writing, as required by section 4 of said act, stating the amount of bonds desired to be $50,000. The requisite notices were given, and on the 30th day of March, 1878, the railroad company delivered to the town-clerk four petitions in the form required by section 7 of said act, to each of which petitions was attached a copy of said proposition. These petitions were filed with the town-clerk, and bore the signatures of a majority of the persons residing in the town of Plainview who were assessed for taxes therein, as shown by the last assessment roll; and they constitute the only authority had or claimed for the issue of the bonds in controversy in this action. No election was ever held in the town to authorize the supervisors to agree to said proposition, or to issue any bonds.

The requirements of section 7 of the statute under which these bonds were issued were in all respects performed and complied with

by the Plainview Railroad Company; and it is stipulated, and was found by the trial court as a fact, that the said statute was in all respects complied with, and that said Plainview Railroad Company had, prior to the issuance of said bonds, earned and become entitled to the same, if the law authorizing their issue was constitutional, and that there was no election or vote of the electors of the town respecting the issue of said bonds, and that the proceedings had were by and in pursuance of a petition of the majority of the tax-payers of said town, as provided in the statute.

On March 30, 1878, the board of supervisors of the town, acting by virtue of the foregoing petition, etc., and without any other authority or right, adopted and placed on file in the office of the town-clerk a resolution (reciting the above facts as to the petition, proposition, and signatures of the tax-payers) that the proposition of the railroad asking aid to the construction of its railroad by the bonds of the said town in the sum of $50,000 be accepted and agreed to on the terms and conditions in said proposition stated, and directing the issue of such bonds to the railroad company whenever and as soon as the said company shall have its railroad completed, with the cars running thereon, as specified in said proposition, and that the issue of stock by the Plainview Railroad Company to the town of Plainview be waived, and the railroad company be absolved from any and all obligations to issue the same. (Plainview Record, pp. 144 to 146.)

Shortly after these proceedings, and before the issuance of any of the bonds, George W. Harrington, a resident and tax-payer of the town of Plainview, brought an action in the district court of Minnesota for the county of Wabasha against the supervisors of the town, the clerk of the town, the town, and the railroad company, based upon the aforesaid premises, for the purpose of enjoining the defendants from issuing, and the company from receiving, any of the bonds or coupons, on the ground that section 7, c. 106, of the Laws of 1877 was unconstitutional, and that said proceedings thereunder were wholly void. The defendants made answer to the complaint; and the district court, on November 11, 1878, granted a preliminary injunction restraining the issue or reception of the bonds. This injunction was duly served upon all of the defendants.

The action was tried on January 27, 1879; and on February 6,

1879, the court rendered its decision that the plaintiff was not entitled to the relief asked, and that the defendants were entitled to judgment dismissing the action. On February 8, 1879, an order was made, on the application of the plaintiff's attorney, staying proceedings upon the finding and decision for twenty days from date to enable the plaintiff to prepare a case or bill of exceptions. On February 26, 1879, a further stay of fifteen days was granted to plaintiff. On March 11, 1879, the district court denied a motion for a new trial made by Harrington, and on the same day a bond for appeal was given by him, reciting that he had appealed to the supreme court of Minnesota from said order, and on May 12, 1879, he gave notice of appeal to said court from the order denying the motion for a new trial, and on March 15, 1879, the district court rendered a judgment that said action be dismissed on the merits, and the preliminary injunction dissolved.

On September 12, 1879, the plaintiff in that action gave notice of appeal to the supreme court from such judgment, gave a bond for costs in the sum of $250, and duly filed in the supreme court a transcript of the record. On October 6, 1880, the supreme court adjudged and decreed said section 7 of the act of 1877 to be unconstitutional and void, and that all said proceedings were invalid, and that the town had no authority to issue, nor the railroad company any authority to receive, such bonds, and reversed the judgment of the district court. (Plainview Record, pp. 146 to 148.)

On March 18, 1879,—three days after the judgment in the district court,—the board of supervisors of the town, at the instance of the railroad company, passed and placed on file in the office of the town-clerk a resolution reciting the proposition of the railroad company for aid in the construction of the road, by bonds of the town, in the sum of $50,000; the acceptance of said proposition; the compliance of the railroad company with the terms of the proposition, by the construction of its road by November 1, 1878, as agreed; and directed that the bonds of the town of Plainview be issued to the railroad company in such amount, dated January 1, 1879, to become due on or before twenty years from such date, with interest payable annually, at seven per cent. per annum; and directed the chairman of the board of supervisors of the town and the town-clerk to sign and issue such bonds for the town; and again waived the issue of stock by

the Plainview Railroad Company to the town. (Plainview Record, pp. 148 and 11.)

On March 19, 1879, the chairman and town-clerk, acting under the provisions of section 7 of said act, and without any other authority, executed and delivered to the Plainview Railroad Company its negotiable bonds, and coupons attached thereto, one hundred in number, purporting to be the bonds of the town of Plainview, payable to the Plainview Railroad Company or bearer, for $500 each, amounting in the whole to the sum of $50,000, in the form prescribed by such resolution. These officers had not been authorized to do this by any election ever held in said town, or by any of the laws of Minnesota, or by any act or proceeding excepting as hereinbefore set forth; and the same were executed and delivered without any consideration whatever, and the railroad company received the same well knowing the premises hereinbefore set forth. (Plainview Record, pp. 148, 149.)

Afterwards, and in the forepart of July, 1879, the Plainview Railroad Company, with knowledge of the premises, and intending to deprive the town of any defense to the bonds and coupons, as against any *bona fide* holder for value therefor, sold and delivered said bonds and coupons to the Chicago & Northwestern Railroad Company, a Wisconsin and Illinois corporation, for the sum of $50,000, which sum had been previously advanced by said railroad company to said Plainview Railroad Company for the construction of the road of the latter company; and thereafter, and on or about July 10, 1879, the said Northwestern Railroad Company sold and delivered all of such bonds and coupons to one T. Thomas, a citizen of Wisconsin, for the sum of eighty per cent. of the par thereof, who immediately, and in the same month, (July, 1879,) sold and delivered such bonds to Samuel Marshall and Charles T. Illsley, citizens of the state of Wisconsin, for the sum of eighty-seven per cent. of the par thereof. (Plainview Record, p. 149.)

The Northwestern Railroad Company and Thomas had notice and knowledge of all the facts preceding the issue and delivery of such bonds to the Plainview Railroad Company, except as to the pendency of the Harrington suit; but Marshall and Illsley had no knowledge, when they purchased said bonds, of any of the said facts or proceedings, nor of the pendency of said suit, but bought and paid for such bonds without knowledge or notice of any defense thereto, except

such as appears upon the face of such bonds, and became and were thereby *bona fide* purchasers and holders thereof for value. (Plainview Record, pp. 149, 150.)

On or about January 29, 1881, the town refused to pay the interest coupons then due, and Marshall and Illsley, citizens of the state of Wisconsin, commenced an action in the circuit court of the United States for the district of Minnesota against the town, to recover the amount on interest on said coupons falling due January 1, 1881. The town of Plainview defended the action, by answer denying that the bonds or coupons were ever executed by the defendant or by its authority. The answer alleged that each and all of the bonds were executed by the chairman and clerk pursuant to the pretended authority and provisions of section 7, c. 106, of the General Laws of Minnesota for the year 1877, and in no other manner and by no other authority. The answer also set up the proceedings prior to the issuance of said bonds substantially as set up in the complaint in the present case, and as hereinbefore stated, and had attached thereto a copy of the notice and proposition set up in said complaint. The answer also set up the bringing of the suit by George Harrington, and the proceedings in the district court and the supreme court, and the orders and judgments therein. Marshall and Illsley, replying to the answer, alleged that they purchased the bonds and coupons on the 8th day of July, 1879, for a valuable consideration, and without any notice of any of the matters relied on in defense of such action, except as appears on the face of said bonds and the recitals therein contained. (Plainview Record, p. 150.)

This suit came on for trial before the United States circuit court on October 11, 1881. The court, a jury trial having been waived, found as facts in said action that the bonds and coupons were purchased by Marshall and Illsley on July 9, 1889, for value, and without notice of any of the matters relied on for defense except as appears on the face of the bonds, and rendered a judgment against the town in the sum due on the coupons, $1,697.66, and $47.32 costs,—in all, $1,746.98,—and adjudged that in the hands of said Marshall and Illsley said bonds and coupons were valid and enforceable obligations against the town of Plainview. (Plainview Record, p. 151.)

On March 17, 1883, the town paid the judgment, and took a writ

of error therefrom to the supreme court of the United States, which court dismissed the writ, prior to the commencement of this present action, on the ground that the amount in controversy was less than $5,000. (Plainview Record, p. 151.)

After the institution of this suit, Marshall and Illsley brought in said circuit court five other suits against the town to recover on certain other coupons of said bonds, which had become due year by year, according to the terms thereof, namely, one suit commenced November 21, 1881; another suit commenced March 2, 1882; another suit commenced May 11, 1883; another suit commenced September 17, 1883; and another suit commenced January 5, 1884. In the two suits brought November 1, 1881, and March 2, 1882, the town of Plainview interposed the same answer as to the first suit brought against it, but to the other suits it made no answer, for the reason that the question of its liability as to the *bona fide* holder of said bonds and coupons had become *res adjudicata* in that court. And accordingly the circuit court so proceeded in said actions that in each of them judgment was rendered against the town of Plainview, as follows: In the action commenced November 1, 1881, for $1,717.31; in the action commenced March 2, 1882, for $4,154.08; in the action commenced May 11, 1883, for $2,595.57; in the action commenced September 17, 1883, for $771.15; and in the action commenced January 5, 1884, for $3,906.22. Of such judgments last named said town of Plainview has paid as follows: On June 21, 1884, it paid on said judgment in the suit commenced March 2, 1882, $4,154.08; on the 1st of April, 1884, it paid on the judgment in the suit commenced November 1, 1881, $1,717.31; on the 9th of April, 1885, it paid on the judgment in the suit commenced May 11, 1883, $2,595.57, and will be compelled to pay the remainder of the other judgments as yet unpaid. (Plainview Record, pp. 151, 152.)

The foregoing statement of the history of these bonds and as to the suits brought by Marshall and Illsley against the town are taken from the findings of fact by the trial court. These findings of course cannot be now controverted. They are amply sustained by the record in those proceedings, which is set forth in pages 45 to 52 of the Plainview Record, and to them we refer, particularly to call the attention of the court to the fact that Marshall and Illsley, in their pleadings in the suits brought by them, averred (page

50, fol. 79) that "they purchased the bonds and coupons in question on the 9th day of July, A. D. 1879, for a valuable consideration by them then paid therefor, and without any notice or knowledge of any of the matters relied on in defense of such action except such as appeared on the face of the bonds."

It was also found as a fact by the trial court that prior to the commencement of this present action, Marshall and Illsley sold and transferred to various persons, who were *bona fide* purchasers without notice or knowledge of any of the matters which it was claimed invalidate such bonds and coupons, all of the bonds and coupons except such coupons as they had obtained judgment upon, and that said bonds and coupons, once held by them, are held and owned by said *bona fide* purchasers or their assigns, and are or will be in the hands of such transferees valid and subsisting obligations against the town which it will be compelled to pay in full, principal and interest.

The trial court further found as facts that in the year 1881 the state of Minnesota enacted a statute entitled, "An act to authorize the Winona & St. Peter Railroad Company to purchase the stock and to purchase or lease the property and franchises of the Plainview Railroad Company," as follows:

"Be it enacted by the legislature of the state of Minnesota:

"Section 1. The Winona & Saint Peter Railroad Company is hereby authorized to purchase the stock or to purchase or lease the property and franchises of the Plainview Railway Company, and said last-named company is hereby authorized to sell and convey or to lease its property and franchises to the said first-named company, upon such terms as may be agreed upon by the respective boards of directors of said companies, so as to make the property and franchises of the last-named company a part of the property and franchises of said Winona and Saint Peter Railroad Company to be used and operated by it under its charter:

"Provided, that any such purchase of the property or franchises of the Plainview Railway Company shall be made, and all such property held by said Winona and Saint Peter Railroad Company, subject to all demands, claims, and rights of action against said Plainview Railway Company arising or growing out of the latter company's having heretofore obtained and disposed of certain bonds and coupons purporting to have been issued by the towns of Plainview, Elgin, and Viola to said Plainview Railway Company; and in taking such transfer under this act said purchasing company shall assume all claims and demands against said Plainview Railway Company to

the extent and value only of the property and franchises so transferred.

"Sec. 2. The Winona and Saint Peter Railroad Company is hereby authorized to issue its capital stock to an amount necessary to make and complete the purchase aforesaid.

"Sec. 3. This act shall take effect and be in force from and after its passage.

"Approved March 3, 1881."

That this act, after its passage, was duly accepted and consented to by the said Winona & St. Peter Railroad Company. The bonds and coupons in question in this action are the same bonds and coupons intended by this statute.

That on the 11th day of May, 1881, the Winona & St. Peter Railroad Company, acting solely under the provisions of this statute, purchased all the property and franchises of the Plainview Railroad Company referred to in said statute, and took a deed and transfer thereof from said Plainview Railroad Company. That the value of the property and franchises of the Plainview Railroad Company so transferred is equal in value to any judgment which can be obtained in this action, and for the purposes of this action the value of such property was at the time of such transfer the sum of $225,000. (Plainview Record, pp. 152, 153.)

That immediately after the execution and conveyance by the Plainview Railroad Company to the Winona & St. Peter Railroad Company, the latter took possession of all the property and franchises conveyed, and has ever since owned and used and enjoyed the same.

The trial court found as a fact that such purchase was made and such deed received under and by virtue of the statute of March 3, 1881, and the powers therein granted; and the Winona & St. Peter Railroad Company, in making such purchase and in taking such deed and transfer, as part of the consideration thereof assumed all claims and demands and rights of action against the Plainview Railroad Company, and particularly assumed, and became liable for, all claims and demands arising in this action, and agreed to pay the same. (Plainview Record, p. 155.)

The foregoing statement is based upon the findings of fact by the trial court, and such finding determined that all the allegations of the complaint (Plainview Record, pp. 2 to 14) are true; and the court found, as conclusions of law from said findings of fact, that the

town of Plainview was entitled to judgment against the Winona & St. Peter Railroad Company in the sum of $50,000, with interest thereon from January 1, 1879, at seven per cent. per annum, amounting to $74,451.31, together with costs and disbursements.

The answer to the complaint (pages 14 to 21, Plainview Record) does not specially or otherwise set up or claim any right, privilege, or immunity under the constitution or any treaty or statute of the United States, nor does it contain any suggestion as to the effect that ought to be given to the judgments in favor of Marshall and Illsley. The only reference in the answer to these suits is (Plainview Record, pp. 19, 20) that Marshall and Illsley, being in 1881 the owners of some of the over-due coupons attached to said bonds, brought suit in the circuit court of the United States in and for the district of Minnesota against the plaintiff to recover the sum due on said coupons; that in said suit this plaintiff appeared, and defended upon the ground that said bonds were not legally issued, and that the law under and in pursuance of which they were issued was unconstitutional; that said court had jurisdiction of said parties in said suit, and of the cause of action, and at the June term of said court, in 1881, judgment was rendered in said action in favor of the plaintiff and against the defendant, in and by which it was decreed and adjudged that said bonds were legally issued, and that they were valid and binding obligations upon the town; that said Marshall and Illsley, who purchased some of said bonds and coupons, had, when they purchased the same, notice and knowledge of the terms of the law under which they were issued, and of the proceedings had as a condition precedent of their issue; and the defendant denied that they have had or could have any greater right to recover thereon than the Plainview Railroad Company could have if it owned said bonds, and denied that the plaintiff has been, is, or could be, by the transfer of said bonds or coupons, deprived of any defense which it could have as against said Plainview Railroad Company. These allegations are controverted by a general denial in the plaintiff's reply. (Plainview Record, p. 22.)

To recur to the suits by Marshall and Illsley against the town of Plainview in the United States circuit court for the district of Minnesota. The plaintiffs in that action alleged (page 25, Plainview Record) that they were the lawful owners and holders and bearers of the

bonds and coupons sued upon. The defendant town set up in its answer (pages 27–30) all of the facts and proceedings hereinbefore stated, and relied upon the same to invalidate the bonds in the hands of Marshall and Illsley, and alleged that all of such matters and facts were, and always had been, well known to and by said Marshall and Illsley for a long time prior to the purchase of the bonds and coupons.

To this Marshall and Illsley replied, (page 31 of Plainview Record,) averring that they purchased the bonds and coupons on the 8th day of July, 1879, for a valuable consideration, without any knowledge in fact of any of the matters relied on in defense of said action, except such as appears on the face of said bonds, and from the recitals therein contained.

For the purposes of trial of said action it was stipulated as a fact —and it was a fact, as appears by the testimony and finding in this case (Plainview Record, p. 33—that Marshall and Illsley purchased the bonds and coupons in suit on July 9, 1879, for value, and without notice in fact of any of the matters relied on in defense except as appeared on the face of the bonds. The opinion of the circuit court, (pages 37 and 38, Plainview Record,) when considered in reference to the issues and stipulation of facts, manifestly held Marshall and Illsley to be *bona fide* holders.

To return to the proceedings in the state court in the present action. After the decision of the district court hereinbefore referred to, the defendant moved to vacate and set aside the decision and findings, and for a new trial. This motion was denied, May 29, 1886, and on June 3, 1886, an appeal was taken from this order to the supreme court of the state of Minnesota. (Plainview Record, pp. 156, 157.) There is no assignment of errors in this record upon that appeal which specially or in any manner sets up or claims any right, privilege, or immunity under the constitution, or any treaty or statute of the United States; nor does it contain any suggestion as to the effect which ought to be given to the judgments in favor of Marshall and Illsley. In fact no errors whatever were assigned in the supreme court of Minnesota. Rule 9 of that court provides that—

"Prefixed to the brief, but stated separately, shall be an assignment of the errors asserted and intended to be urged. * * * No error not affecting the jurisdiction over the subject-matter will be considered unless stated in the assignment of errors."

Against this disregard of the rule, the defendants in error protested in opening their brief in that court. Nor does it appear in the opinion of the supreme court of the state of Minnesota (36 Minn. p. 505; Plainview Record, pp. 179–186) that any such right, privilege, or immunity was set up or claimed; nor does it contain any suggestion as to the effect which ought to be given in these cases to the judgments in favor of Marshall and Illsley against the town.

The supreme court of Minnesota affirmed the judgment of the court below, denying a motion for a new trial, (Plainview Record, p. 157,) and issued its mandate to the district court, in which court judgment was entered for damages and costs in favor of the town of Plainview, and against the Winona & St. Peter Railroad Company, for $80,288.95. (Plainview Record, p. 159.)

The railroad company appealed from this judgment, by notice served August 15, 1887. No error was assigned in these appeals. (Plainview Record, p. 159.) On April 19, 1888, the supreme court of Minnesota ordered that said judgment be affirmed, "for the reasons stated and given in the opinion of this court upon the former appeals in these cases, from the order of the court below denying a new trial therein." (Plainview Record, p. 165.) On the 9th of May, 1888, its judgment of affirmance was duly entered pursuant to such order. (Plainview Record, p. 166.) On the same day (page 167) the railroad company petitioned for the allowance of a writ of error to the supreme court of the United States, and here for the first time appears any attempt to raise a federal question.

It is stated in the petition for a writ of error (page 168) that the district court and the supreme court of the state of Minnesota disregarded and changed the decisions of said supreme court before made in such cases, and the statutes and laws of the state of Minnesota which were in force when said bonds were earned and issued, in violation of the contract rights of the holders of said bonds; all of which appears in the records of said supreme court, and all of which the petitioner alleges is in violation of the constitution of the United States, forbidding the impairment of the obligation of contracts.

It is further stated in this petition that prior to the commencement of this action, and after the transfer of the bonds by the Winona & St. Peter Railroad Company, Marshall and Illsley, who had become the owners of certain of said bonds under the defendant,

brought an action thereon against the plaintiff town in the circuit court of the United States for the district of Minnesota, and that such court decided and adjudged that said bonds were valid and legal obligations, and that said town should pay the same to the said Marshall and Illsley, and that the supreme court of Minnesota failed or refused to give any effect to the said judgment of the circuit court of the United States, except that each of them held and decided that said judgment was against law, and invalid, and that by the rendition and execution of judgment thereon the plaintiff town was legally damnified, and that on account of its rendition, and the payment of part and the liability to pay the rest of said bonds by plaintiff town thereunder, this defendant became and was liable to the plaintiff town in this suit; all of which, it is stated, appears of record in the supreme court of Minnesota. And the petitioner insists that, in disallowing the validity of said judgment of the circuit court of the United States, the district court and the supreme court of Minnesota disregarded and violated the laws of the United States. The petition also states that the plaintiff in error is aggrieved by the said judgment of the supreme court affirming the judgment of the district court, because it is claimed that there is drawn in question the validity of an authority exercised under the United States, and because it claims that a right, title, or privilege, and immunity was by it set up and claimed under the constitution of the United States, and the decision of said supreme court was against such title, right, privilege, and immunity so claimed, and because it claims that the said decision of the supreme court of Minnesota, changing the operation, force, and meaning of the statutes and laws of the state of Minnesota, was an impairment of the obligation of the contract of the plaintiff town with the holders of said bonds; all of which, it is stated, appears by the records of the said suits herewith submitted, and that petitioner claims the right to remove said judgment of the supreme court of Minnesota to the supreme court of the United States by writ of error, under section 709 of the Revised Statutes of the United States.

As we have before stated, the record in the case of the Town of Elgin is substantially similar to that in the case of the Town of Plainview. The proceedings in respect of the bonds, and for the delivery of the same, were similar. The bonds were delivered to the

Plainview Company, November 16, 1878. (Elgin Record, p. 129.) The town of Elgin was not, however, a party to the suit brought by Harrington, and it is in this alone that the cases substantially differ in any respect. The issue of the bonds to the Plainview Railroad Company, their transfer to the Northwestern Company, their transfer by that company, and their acquirement by Marshall and Illsley were by substantially the same acts, and by the same individuals, and were done at the same time. Marshall and Illsley sued both towns at the same time in the United States circuit court for the district of Minnesota, and the cases were heard and determined in that court together upon the same evidence. The pleadings and stipulations were the same as to all general facts claimed to impose liability or constitute defense, and judgments were rendered in favor of Marshall and Illsley against the town of Elgin as follows: In an action commenced October 11, 1881, $1,691.85; in an action commenced November 1, 1881, for $1,443; in an action commenced February 27, 1882, for $2,852; in an action commenced May 11, 1883, for $2,745.12; in an action commenced January 5, 1884, for $3,175.82. That of such judgments the town of Elgin has paid as follows: On the judgment of March 11, 1881, $696.85; on the judgment of January 10, 1883, $2,853.05; on the judgment of June 10, 1883, $1,443.91,—all of which payments were made prior to the commencement of this action. The findings of fact in the present cases are the same in all material matters, and the proceedings before the district court and the supreme court of the state of Minnesota were substantially the same in both cases, and as hereinbefore set out in respect of the case of the Town of Plainview.

The amount of bonds issued by the town of Elgin was $40,000, and the judgment was rendered against that town, including damages and costs, for $64,245.77. (Elgin Record, p. 139.)

I.

It does not appear by these records that any title, right, privilege, or immunity, under the constitution or any treaty or statute of the United States, was specially or otherwise set up or claimed in the district court or supreme court of Minnesota at any time or in any way; nor does it appear by any intendment that any such title, etc., was adjudicated upon by the said courts.

The answer of the railroad company does not set up or claim in either case any title, right, privilege, or immunity under the constitution or any treaty or statute of the United States.

There are not in either of these records any assignments of error raising these questions before the supreme court of Minnesota, nor does it appear that they were raised in the district court of Minnesota. The opinion of the supreme court of Minnesota (Plainview Record, fol. 273 *et seq.*) does not show that any such title, right, privilege, or immunity had been claimed, nor does that court in its opinion consider the same.

The first attempt made to set up or claim in these records anything respecting any alleged denial of any such title, right, privilege, or immunity, or the existence of any such question, was subsequent to the judgment of the supreme court of Minnesota; and it appears in the petitions for the allowance of a writ of error. (Plainview Record, fol. 242 *et seq.*; Elgin Record, fol. 209 *et seq.*)

The writs of error were filed in the supreme court of Minnesota, June 7, 1888. (Plainview Record, fol. 296; Elgin Record, fol. 245.) About four months afterwards, and on October 2, 1888, (Plainview Record, fol. 311; Elgin Record, fol. 260,) the plaintiff in error filed in the supreme court of Minnesota in each case a paper assigning eighteen several errors, (Plainview Record, fol. 209 *et seq.*; Elgin Record, fol. 248 *et seq.*) It is apparent from these records that they do not, within the decisions hereinafter cited, bring these cases within the jurisdiction of this court.

The allegations of error in the petition for the writ, and the assignments of error in this court after the writ had become effectual, do not supply that wherein the record was before defective.

In *Chappell* v. *Bradshaw*, 128 U. S. 132, 134, Bradshaw recovered judgment in the Maryland state court for damages by fire to his schooner, resulting from the negligence of Chappell's servants in cutting a burning scow loose from Chappell's wharf, and allowing it to drift against Bradshaw's vessel. From this judgment Chappell appealed to the court of appeals of Maryland, and that court affirmed the judgment. After such affirmance, Chappell moved for a rehearing upon a ground which up to that time had not been presented in any form,—that the trial court should have limited the measure of damages to the value of the scow which occasioned the injury complained of, under the provisions of the act of congress of June 26, 1884. The court of appeals overruled the motion, stating that "this act of congress was not before the circuit court when the case was tried, nor before this court on appeal, and that no reference to it or construction of it was made in either court."

A motion was made in the supreme court to dismiss the writ, and in granting such motion this court observed:

"To give this court jurisdiction to review the judgment of a state court, under section 709 of the Revised Statutes, because of the denial by a state court of any title, right, privilege, or immunity claimed under the constitution or any treaty or statute of the United States, it must appear on the record that such title, right, privilege, or immunity was 'specially set up or claimed' at the proper time in the proper way. 'To be reviewable here,' says WAITE, C. J., in *Spies* v. *Illinois*, 123 U. S. 181, 'the decision must be against the right *so set up or claimed*. As the supreme court of the state was reviewing the decision of the trial court, it must appear that the claim was made in that court, because the supreme court was only authorized to review the judgment for errors committed there, and we can do no more.' Tested by this well-settled rule, it is apparent that this writ of error did not set up or claim in the trial court the limitation, the benefit of which he now insists should have been accorded him."

"The rule is settled that, to give this court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a federal question was presented for decision by the highest court of state having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without decid-

ing it. *De Saussure* v. *Gaillard*, 127 U. S. 216; *Johnson* v. *Risk*, 137 U. S. 300."

County of Cook v. *Calumet & Chicago Canal & Dock Co.*, 138 U. S. 635, 651.

Brooks v. *Missouri*, 124 U. S. 394.

French v. *Hopkins*, Id. 524.

"This court has no jurisdiction to review a judgment of the highest court of a state unless a federal question has been, either in express terms or by necessary effect, decided by that court against the plaintiff in error. Rev. St. § 709; *New Orleans Water-Works* v. *Louisiana Sugar Refining Co.*, 125 U. S. 18; *De Saussure* v. *Gaillard*, 127 U. S. 216; *Hale* v. *Akers*, 132 U. S. 554. In the present case, the record of the pleadings, findings of fact, and judgment shows that it was unnecessary for that court to decide, and its opinion filed in the case and copied in the record shows that it did not decide, any question against the plaintiff in error except the issue whether the former judgment rendered against it, and in favor of the grantor of the defendants in error, was a bar to this action. That was a question of general law only, in no wise depending upon the constitution, treaties, or statutes of the United States. *Chouteau* v. *Gibson*, 111 U. S. 200."

San Francisco v. *Itsell*, 133 U. S. 65, 66.

"To give this court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it. *New Orleans Water-Works Co.* v. *Louisiana Sugar Refining Co.*, 125 U. S. 18, 29; *De Saussure* v. *Gaillard*, 127 U. S. 216; *Hopkins* v. *McLure*, 133 U. S. 380."

Blount v. *Walker*, 134 U. S. 607.

The petition for the writ of error and the subsequent assignments of error form no part of the record in respect of assignments of error.

In *Clark* v. *Pennsylvania*, 128 U. S. 395, Clark was convicted in the state court for unlawfully selling spirituous liquors without first having obtained a license, and for selling spirituous liquors on Sunday, and was sentenced to pay a fine and to be imprisoned. In the petition for the writs it was stated that the plaintiff in error was the part owner and captain of a steam-boat actually engaged in navigating

the Ohio, Monongahela, and Alleghany rivers as a passenger vessel, and, as such, duly licensed and enrolled under the laws of the United States, and that petitioner had complied with all the laws of the United States in regard to steam-vessels, including the payment of a revenue tax for the purpose of selling liquor on said steam-boat; and it was averred that by these judgments petitioner is denied "the rights and privileges secured by the constitution of the United States." The court say:

"The evidence upon which the plaintiff in error was convicted is not made a part of the record, nor what it tended to establish anywhere therein stated. Certain instructions which were requested to be given to the jury, and which were refused by the court of quarter sessions, appear and seem to have been asked with the view of raising the question suggested; but whether the action of the court actually involved the point can only be determined upon a record embracing sufficient of what passed upon the trial to show that it necessarily did so. We act only upon the record of the court below, and of that record the petitions for the writs of error form no part. *Warfield* v. *Chaffe*, 91 U. S. 690; and see *Susquehanna Boom Co.* v. *West Branch Boom Co.*, 110 U. S. 57. It is essential that the record should disclose, not only that the alleged right, privilege, or immunity was specially set up and claimed in the court below, but that the decision of that court was against the right so set up or claimed. In the absence of anything in these records to show that the instructions requested were based upon evidence, and could have been properly given if Clark were right in his claim of immunity, we cannot tell whether or not the refusal to give them amounted to a ruling in denial of such claim."

"The petition for the writ of error avers 'that said action involves divers federal questions, one of which is whether said acts of congress authorized said defendants to promulgate or enforce said order, and another of which is whether so much of said acts of congress as undertake (if any part thereof undertakes) to authorize the defendants to make such order was not in violation of articles 5 and 8 of the amendments of the constitution of the United States;' and the decision of said state court was adverse to the plaintiff's contention upon all of said federal questions.

"The grounds thus suggested have been disposed of by what has been said, and it may be added that the petition for a writ of error forms no part of the record upon which action here is taken. *Clark* v. *Pennsylvania*, 128 U. S. 395; *Warfield* v. *Chaffe*, 91 U. S. 690."

Manning v. *French*, 133 U. S. 189, 192.

Butler v. *Gage*, 138 U. S. 52, was error to the supreme court of the state of Colorado. The answer raised no federal question. Judgment was rendered in the trial court, whereupon the case was taken to the supreme court of Colorado. Forty-three errors were assigned, but these involved no federal question. The judgment of the court below was affirmed. Thereafter the appellants filed a petition for a rehearing, assigning various reasons, but suggesting no federal question. This motion was denied. The appellants afterwards presented a petition to the chief justice of the supreme court of the state of Colorado for the allowance of a writ of error addressed to the chief justice of the supreme court of Colorado. In this paper it was stated that the rulings of the court drew in question the constitutionality of certain statutes of the state of Colorado as repugnant to and inconsistent with the fourteenth amendment to the constitution of the United States, and that the decision in effect sustained the validity of the right so drawn in question. The writ of error was dismissed.

This court, after disposing of a preliminary question, observes:

"This brings us to consider whether the record before us so presents a federal question as to justify the maintenance of the writ. And it may be remarked in the outset that the petition for a writ of error forms no part of the record upon which action here is taken. *Manning* v. *French*, 133 U. S. 186; *Clark* v. *Pennsylvania*, 128 U. S. 395; *Warfield* v. *Chaffe*, 91 U. S. 690."

The writ was dismissed.

"It must be regarded as settled that a petition for a writ of error forms no part of the record upon which action here is taken. *Manning* v. *French*, 133 U. S. 186; *Clark* v. *Pennsylvania*, 138 U. S. 395; *Warfield* v. *Chaffe*, 91 U. S. 690; *Butler* v. *Gage*, 138 U. S. 52. That to give this court jurisdiction to review the judgment of a state court, under section 709 of the Revised Statutes, because of the denial by the state court of any right, title, privilege, or immunity claimed under the constitution or any treaty or statute of the United States, it must appear on the record that such title, right, privilege, or immunity was specially set up or claimed at the proper time and in the proper way. *Spies* v. *Illinois*, 123 U. S. 131, 181; *Baldwin* v. *Kansas*, 129 U. S. 52; *Chappell* v. *Bradshaw*, 128 U. S. 132."

Leeper v. *Texas*, 139 U. S. 462.

See, also, *Semmerman* v. *Nebraska*, 116 U. S. 54.

Detroit City R.Co. v. *Guthard*, 114 U. S. 133.

Parmalee v. *Lawrence*, 11 Wall. 36.
Murdoch v. *Memphis*, 20 Wall. 590.
McManus v. *O'Sullivan*, 91 U. S. 578.
State v. *Board of Liquidation*, 98 U. S. 140.

Tested by these decisions, the writs of error should be dismissed.

II.

No federal question is involved in these cases.

The assignments of error in the petition for the writ, and those filed after the writs of error were lodged, are stated in substance by the counsel for the plaintiffs in error on page 14 of his brief on the motion heretofore made to dismiss these cases, as follows:

"*First.* Did the supreme court of Minnesota, in rendering its judgment in these cases, fail to give to the judgments of the United States circuit court in the Marshall and Illsley cases such faith and credit as they were entitled to under the constitution and laws of the United States? *Second.* Did it, in rendering these judgments, disregard the provision of the constitution of the United States that no state shall pass any law impairing the obligation of a contract?"

As to the question respecting the judgments of the United States circuit court in the Marshall and Illsley cases. Neither of the railroad companies were parties to the suits in which those judgments were rendered. The plaintiff in error, not having been a party to those suits, nor in privity with any party to them, cannot claim in its favor the application of the requirement that full faith and credit shall be given to the judgments in those cases. This court has so adjudged.

In *Giles* v. *Little*, 134 U. S. 645, it appeared that this court had decided in a former case that Mrs. Dawson took under a certain will only an estate for life, determinable upon her marrying again, and that she had no power to convey a greater estate than she had herself. In the case at bar the supreme court of Nebraska, declining to follow that decision, and basing its judgment largely upon the statutes of that state, held that she took an estate in fee, determinable upon her marriage, with power during her widowhood, at her discretion, to convey in fee any part of the land.

This court says:

"The question of the true construction of the will in this respect depends wholly upon general rules of law, and upon the local statutes, and in no degree upon the constitution, laws, or treaties of the United States; and the disregard by the state court of the opinion of this court upon the question in a former suit does not give this court jurisdiction to review the judgment of the state court in this case. *Leather Manufacturers' Bank* v. *Cooper*, 120 U. S. 778; *San Francisco* v. *Scott*, 111 U. S. 768; *San Francisco* v. *Itsell*, 133 U. S. 65.

"If the state court had refused to give due effect to a final judgment of any court of the United States in a case between the same parties, a federal question would have been presented, which might have been brought to this court for review. *Dupasseur* v. *Rochereau*, (88 U. S.) 21 Wall. 130; *Crescent City Live-Stock Co.* v. *Butchers' Union Slaughter-House Co.*, 120 U. S. 141. But this record presents no such state of things.

"The case of *Giles* v. *Little*, 104 U. S. 291, was indeed one between one of the present defendants and one of the present plaintiffs, and concerned the title to a lot of land now claimed by the latter; but the judgment of this court only reversed a judgment of the circuit court of the United States sustaining a demurrer to the petition, and remanded the case to that court for further proceedings, and (as appears by the record given in evidence at the trial of the case at bar) the petition was afterwards, and before final judgment, dismissed on motion of the plaintiff, without prejudice to a new action; so that nothing was finally adjudged in that case, even as between the parties to it.

"The ground most relied upon in favor of a reversal of the judgment of the state court is its refusal to give effect to the judgments obtained in the circuit court of the United States against some of the present plaintiffs by Miles, a grantee of the present defendants. It is argued that the judgments in favor of Miles conclusively showed that some of these plaintiffs had no title, and that, as all these plaintiffs claimed under one title in the present suit, the judgment below in their favor must be reversed as to all of them.

"As the present defendants did not claim under Miles, and were not parties to his suits, it is difficult to see how judgments in those suits could have any effect as evidence for or against them, by way of estoppel or otherwise.

"But it is certain that they neither had nor claimed any interest in the title acquired by Miles under those judgments. It is well settled that, in order to give this court jurisdiction to review a judgment of a state court against a title or right set up or claimed under a statute of, or an authority exercised under, the United States, that title or right must be one of the plaintiff in error, and not of a third person only. *Owings* v. *Norwood*, (9 U. S.) 5 Cranch, 344; *Montgomery* v. *Hernandez*, (25 U. S.) 12 Wheat. 129, 132; *Henderson* v. *Tennessee*, (51 U. S.) 10 How. 311; *Hale* v. *Gaines*, (63 U. S.) 22

How. 144, 160; *Long* v. *Converse*, 91 U. S. 105. The title set up by the defendants being that of a third person, in which they have no interest, the writ of error is dismissed for want of jurisdiction."

"A writ of error to review the judgment of the highest tribunal of a state stands on far different ground, and cannot be maintained in the absence of a federal question giving us jurisdiction. The state courts rendered no decision in favor of the validity of a statute of, or authority exercised under, the state, drawn in question on the ground of repugnancy to the laws of the United States; nor was any title, right, privilege, or immunity under such constitution or statute specially set up or claimed in the case. It is not within our province to pass upon any of the questions sought to be presented, as they fall entirely within the scope of the exercise of the powers of the state. The writ of error is dismissed." Stoyker v. Gordnow, 123 U.S. 527

Davis v. *Texas*, 139 U. S. 651, 657.

Chapman v. Gordnow, 123 U.S. 540

Litchfield v. Gordnow, 123 U.S. 549

Manifestly, the plaintiff in error obtained no "title, right, privilege, or immunity" by virtue of the judgments in the federal court in favor of Marshall and Illsley. As to it, those judgments are *res inter alios acta*. Neither the constitution nor any act of congress guaranties to every person that the same rule of law shall be applied to his case in all courts that will be applied in cases where citizenship is such that a federal court has jurisdiction.

The case of *Dupasseur* v. *Rochereau* (21 Wall. 130) is decisive of this question. In that case Sauvé executed to Rochereau a mortgage, and Rochereau in the state court obtained judgment for his debt, with a recognition of the special mortgage. He then brought a suit in the same court against Dupasseur, alleging that the latter was in possession of the plantation, and asking a foreclosure of his mortgage as against Dupasseur. Dupasseur had purchased the property at marshal's sale under an execution out of the circuit court of the United States, free of the claim of Rochereau, in a suit brought to foreclose a mortgage made by Sauvé to Dupasseur, but in which suit *Rochereau was not a party*. The Louisiana court held that Rochereau's claim was paramount to that of Dupasseur.

This court says:

"Where a state court refuses to give effect to the judgment of a court of the United States rendered upon the point in dispute, and with jurisdiction of the case and the parties, a question is undoubtedly raised which, under the act of 1867, may be brought to this court for revision. The case would be one in which a title or right

is claimed under an authority exercised under the United States, and the decision is against the title or right so set up. It would thus be a case arising under the laws of the United States establishing the circuit court, and vesting it with jurisdiction; and hence it would be within the judicial power of the United States, as defined by the constitution; and it is clearly within the chart of appellate power given to this court over cases arising in and decided by the state courts.
* * *

"The question then arises, did the supreme court of Louisiana, in deciding against the claim of Dupasseur, refuse, as the defendant charged, to give proper validity and effect to the judgment of the circuit court of the United States, and decide against such validity and effect?

"The only effect that can be justly claimed for the judgment in the circuit court of the United States is such as would belong to judgments of the state courts rendered under similar circumstances. Dupasseur & Co. were citizens of France, and brought the suit in the circuit court of the United States as such citizens; and, consequently, that court, deriving its jurisdiction solely from the citizenship of the parties, was in exercise of jurisdiction to administer the laws of the state, and its proceedings were had in accordance with the forms and course of proceeding in the state courts. It is apparent, therefore, that no higher sanctity or effect can be claimed for the judgment of the circuit court of the United States, rendered in such a case under such circumstances, than is due to the judgments of the state courts in a like case and under similar circumstances. If, by the laws of the state, a judgment like that rendered by the circuit court would have had a binding effect as against Rochereau if it had been rendered in a state court, then it should have the same effect being rendered by the circuit court. If such effect is not conceded to it, but is refused, then due validity and effect are not given to it, and a case is made for the interposition of the power of reversal conferred upon this court.

"We are bound to inquire, therefore, whether the judgment of the circuit court thus brought in question would have had the effect of binding and concluding Rochereau if it had been rendered in a state court. We have examined this question with some care, and have come to the conclusion that it would not.

"The same general rule of law and justice prevails in Louisiana as elsewhere, to the effect that no persons are bound by a judgment or decree except those who are parties to it, and have had an opportunity of presenting their rights. The only apparent exception to this rule in general is the effect of a proceeding *in rem*, which from the necessity of the case is binding on all persons."

The rule deducible from this case is this: Judgments bind only parties to the suit and their privies. Where parties have secured an adjudication in the circuit court of the United States, the judg-

ment confers on them, and on them only, certain "titles, rights, privileges, and immunities," which are inviolable in the state courts. But, where one is not party or privy to the federal judgment, it confers on him no "title, right, privilege, or immunity." Even though the state court, in a subsequent suit to which he is party, should decline to follow the federal decision, this confers on him no right to have the state decision reviewed in this court.

All the decisions of this court are in harmony on this subject. *Green* v. *Van Buskirk*, 5 Wall. 307, 7 Wall. 139, is clearly distinguishable. In that case the New York courts failed to give to the Illinois judgment that faith and credit to which it was entitled. The Illinois judgment was on an attachment, a proceeding *quasi in rem*, and adjudicated that *the property was subject to the attachment*. Green attached the safes in Illinois without notice of the New York chattel mortgage; this gave him, by the Illinois law, the rights of a *bona fide* purchaser of the property. 7 Wall. 146, 147. The Illinois judgment was therefore an adjudication upon the title or *status* of the property itself.

So in *Crapo* v. *Kelly*, 16 Wall. 610, the Massachusetts insolvent proceeding passed to the assignee the title to the property itself, which was a right under the Massachusetts judgment. This court held that the title to this property acquired under the Massachusetts judgment must be respected by the New York courts.

In *Factors' Ins. Co.* v. *Murphy*, 111 U. S. 738, the question was similar to that raised in the last case. This court said, (page 741:)

"But it is apparent that the only controversy in the case relates to the effect to be given to the sale under the order of the district court of the United States to sell the mortgaged property free of incumbrance. Both parties assert rights under this order and sale."

In *Crescent Live-Stock Co.* v. *Butchers' Union*, 120 U. S. 141, the judgment of the federal court held to have been disregarded by the state court was an adjudication on the same subject-matter between the identical parties.

It is only when faith and credit are denied by a state court to a judgment of a court of another state, or of a federal court, that this court takes jurisdiction. The supreme court of Minnesota did, however, give full faith and credit to the judgment of the United States circuit court. This is apparent from its opinion.

"(3) Marshall & Illsley, however, brought suit upon the coupons of these bonds as they matured, and recovered thereon in the circuit court of the United States for the district of Minnesota in a sum less than $5,000, and the bonds have been duly adjudged and determined, in a trial upon the merits in that court, to be valid in their hands.

"For the purposes of this case, we are unable to see that it is material for us to inquire into the particular grounds of the decision of that court, as the result of the judgment is, in any event, to make the bonds valid negotiable securities held by Marshall & Illsley as *bona fide* purchasers. In other words, it is sufficient to say that court differs with this court upon the question of the validity of the bonds, and accordingly adjudges the holders entitled to recover thereon, and notwithstanding the recitals therein. The result would be the same if that court had differed with this court on questions of fact resting upon evidence *dehors* the bonds, as to their execution or the *bona fides* of their transfer to the present holders. And, the Plainview Company and defendant not having been parties to that action, this plaintiff is not estopped from litigating the questions involved in this case in the state courts. The judgment of the circuit court cannot be reviewed or modified by the state courts; and it is not questioned, as we believe, in this case, that the result of the decision and judgment of the circuit court is to fix, irrevocably, the liability of the town for the whole amount of the indebtedness evidenced by the bonds. *Beloit* v. *Morgan*, 7 Wall. 619. It must therefore be deemed to have been conclusively settled that the bonds have been transferred to parties in whose hands they have become valid and legal obligations against the plaintiff town."

Town of Plainview v. *W. & St. P. R. R. Co.*, 36 Minn. 512. (Plainview Record, fol. 282.)

Thus the state court gives all the effect to the federal decision which it could possibly have, to-wit, as settling conclusively the liability of the towns on the bonds to Marshall and Illsley as *bona fide* purchasers. It is, moreover, manifest that the plaintiffs' cases depended, in this aspect, on sustaining the Marshall and Illsley judgments as conclusive and unreviewable. It was an essential element of their cases, to show their damage, that they had been legally compelled to pay the bonds, by a judgment in favor of *bona fide* holders, conclusive in effect, from which they had no escape. For that reason the plaintiff towns claimed in these cases, and the state court expressly held, that the federal judgments were valid and conclusive to their fullest extent.

We anticipate that the counsel for the plaintiffs in error will insist,

as he did in his brief upon the motion to dismiss, that, to use his language—

"The state court's decision plainly was that though the bonds were invalid, and though they contained such recitals as charged all takers with their invalidity, yet the circuit court of the United States had erroneously made the towns liable upon the bonds by its judgments, and for the consequences of such judgments the Plainview Railroad Company, and therefore the plaintiff in error, was responsible.

"The Minnesota supreme court expressly decided that the recitals of the bonds were such as put all takers, including, of course, Marshall and Illsley, 'upon inquiry as requests the authority under which such bonds were entitled to be issued, and the manner in which they were in fact issued. As we [the court] construe the bonds, therefore, all purchasers are chargeable with notice of the invalidity thereof by the recitals.' Consequently, according to the state court's decision, and, as we have seen, according to the clearly-settled law, neither the Chicago and Northwestern Railroad Company, nor Thomas, nor Marshall and Illsley could enforce the bonds against the towns unless the Plainview Railroad Company itself could." (Plainview Record, p. 82.)

This statement omits the fact that the circuit court decided in favor of Marshall and Illsley upon the ground that they were *bona fide* holders of the bonds. It was not called upon to decide anything more. This was the contention on behalf of Marshall and Illsley in the circuit court. The towns took writs of error to this court, but they were dismissed for want of jurisdiction, and the point was expressly made in this court by Mr. Thomas Wilson, on page 13 of his brief, that Marshall and Illsley were protected as *bona fide* holders, as follows:

"*Fourthly.* As to the second alleged error of the court below, little need be said, for it is now clearly settled that the court will not adjudge municipal bonds, issued under a state statute, *to be invalid in the hands of bona fide holders*, simply because the highest court of the state has so determined after the rights of such holders had intervened."

There was no question before the circuit court as to the liability of the towns to the Plainview Company upon the bonds. The discussion by that court of the recitals in the bonds was not for the purpose of so holding. This must be so, for the reason that under the facts, as between the original parties to the bonds, the towns and the Plainview Company, the recitals have no force whatever to cut off any defense to the bonds. The Plainview Company was the insti-

gator of, and was a party to, all the original transactions out of which the bonds were issued, and took nothing by the recitals.

Am. Encyc. of Law, "Municipal Securities," vol. 15, p. 1295.

In view of the entire misconception by the plaintiff in error as to what was in fact decided by the circuit court in the Marshall and Illsley cases, it becomes necessary to ascertain precisely what it did adjudge. We premise by insisting, however, that the reasons stated in its opinion are not material. Some of these, as in any case, may have been correct, and some incorrect. It was the judgment only to which effect was to be given by the state court in the present cases, and that could only be given as a judgment, as we shall show, between the parties to it. The reasons for the judgment, whether written or unwritten, were wholly immaterial.

The complaint in the Marshall and Illsley cases alleged the issue of the bonds and coupons by the towns (being duly authorized) to the Plainview Company; that the plaintiffs are the lawful owners of the same; that default had been made in payment of the coupons sued on. The answer set up all the facts upon which the invalidity of the bonds could be asserted, and alleged knowledge of these facts by Marshall and Illsley before their purchase.

To this Marshall and Illsey replied, denying the invalidity of the bonds, and alleging that they purchased them on the 8th day of July, 1879, for a valuable consideration, and without notice in fact of any of the matters relied on in defense except such as appears on the face of the bonds from the recitals therein contained. (Plainview Record, fols. 44–50.)

This was proper and orderly pleading.

Lexington v. *Rutter*, 14 Wall. 282.
Montclair v. *Ramsdell*, 107 U. S. 147.
Chambers County v. *Clews*, 21 Wall. 317.

For the purposes of trial, certain facts then at issue were agreed upon, among which were:

"That the plaintiffs purchased the bonds in question, July 9, 1879, for value, and without notice in fact of any of the matters, relied upon in defense except such as appears on the face of said bonds;" and that "the only matters relied on in defense are:

"*First*. That the provisions of chapter 106, and particularly of sec-

tion 7 of chapter 106, of the General Laws of the year 1877 of the state of Minnesota, under which the bonds and coupons in question were issued, were and are unconstitutional and void.

"*Second.* That the decision of the supreme court of the state of Minnesota in the case of *Harrington* v. *The Plainview Railroad Company et al.* is conclusive and binding, in respect to said first point, upon the United States courts as an exposition and construction of the constitution of the state of Minnesota."

This agreement also contained a stipulation of facts as to the *Harrington Case.*

(Plainview Record, fols. 56, 57.)

The circuit court, in that portion of its opinion containing the statement of the facts, states that the bonds

—"Were purchased by the plaintiffs, July 9, 1879, for value, and without notice of any of the matters relied on as defenses except such as appear on their face."

—And then goes on to set out the substance of the material sections of the act of 1877, the recitals in the bonds, and the facts in the *Harrington Case.*

Proceeding to its opinion the court observes:

"The only matters relied on in the defense are:

"*First.* That the provisions of chapter 106, General Laws of Minnesota 1877, and particularly of section 7, under which the bonds and coupons issued, were unconstitutional and void.

"*Second.* That the decision of the supreme court of Minnesota in the case of *Harrington* v. *The Plainview Railroad Company* is conclusive and binding, in respect to the first point, upon the federal courts as an exposition and construction of the constitution of the state of Minnesota.

"The view taken by the court will render it necessary to consider only the second defense urged."

(Plainview Record, fol. 61.)

In other words, the fact that Marshall and Illsley were *bona fide* purchasers of the bonds for value, and without notice except as imputed from the recitals in the bonds having been stipulated, the court would consider only the effect of the decision, *as to them,* of the supreme court of Minnesota in the *Harrington Case.*

What the circuit court did hold, and what it must necessarily have held, was that Marshall and Illsley, as purchasers of the bonds

negotiable in form in the markets of the world, acquired peculiar rights as such purchasers, superior to those of the Plainview Railroad Company. The very thing of which we complain is that the wrongful act of the Plainview Railroad Company enabled Marshall & Illsley to acquire those rights. This is not only what the circuit court of the United States must have held, but it appears unmistakably from the opinion that this is just what the circuit court *did* hold. The statement of facts (folio 58 *et seq.*, Plainview Record; opinion of circuit court) informs us that the bonds

—"Were purchased by the plaintiffs, July 9, 1879, for value, and without notice of any of the matters relied upon as defenses except such as appear on their face."

The recitals in the bonds are fully set out. The court says, (folio 62, p. 37, Plainview Record:)

"The recitals in the bonds are conclusive evidence *in favor of the plaintiffs*, who purchased without other information than that which appears on their face, that all the conditions precedent prescribed in the law had been complied with."

On page 37, the court, in speaking of the *Town of Highland Case*, says:

"This decision was rendered Jan. 10, 1879, and at that time the bonds with the coupons in the suit of the town of Elgin had been issued, and was in the market as commercial securities."

It will be noted that they were not negotiated until the following summer. And in the federal courts the doctrine is established by a long array of authorities, including the decision of the circuit court upon which we are commenting, that it is to be presumed that the purchaser bought the bonds knowing of the decisions in the state courts recognizing their validity. The court further says:

"The federal courts, it is true, generally follow the adjudications of the highest courts of the state in the construction of its statutes, but exceptions are recognized, and these cases fall within the rule laid down in the *City* v. *Lampson*, 9 Wall. 477, which is, briefly, where a decision of the highest judicial tribunal at the time the bonds issued favors the validity of the law under which they issue, a subsequent decision impairing their validity will not be followed *to the prejudice of bona fide holders*. To the same effect is *Douglass* v. *Pike County*, 101 U. S. 687. We have no hesitation in saying that the rights of the parties are to be determined according to the law as

it was judicially construed to be when the bonds in question were put on the market as commercial paper."

Again, on page 38, the court says:

"These *bonds, having been purchased by the plaintiffs before the decision in the Harrington Case*, are clean obligations to pay, not affected by the last decision."

The court further says, (page 38:)

"It is urged that the bonds are invalid in the plaintiff's hands, by the fact that they were purchased during the pendency of the suit in which the law was held to be unconstitutional. The answer to this proposition is that the plaintiffs were not parties to it, and had no knowledge of that suit, and the rule that all persons are bound to take notice of a pending suit does not apply to negotiable securities."

If this decision does not hold that the plaintiffs in that case acquired by their purchase better and more enforceable rights in the bonds than the Plainview Railroad Company had, we are unable to appreciate the force of language.

We insist that there is no rule in the federal courts which relieves ordinary contracts, especially between citizens of the same state, from the consequences of the decisions of the state courts, which, after such contracts are made, declare other contracts of a similar character unconstitutional and void. It is impossible that there should be any such rule, in the nature of things, because, in order for the state courts to pass upon the validity of such contracts, they must be made, and rights claimed thereunder must, after the contracts are made, be drawn in litigation. The decisions cited by the learned counsel, though containing some very broad statements of the law, must all be construed in reference to the facts involved in them; and, when those facts are examined, it will be found in every one of the cases that the rights of *bona fide* purchasers of commercial securities were before the court; and, as to the decisions cited of this court, that they were rendered, in every instance, in cases coming to this court from the federal courts, and therefore determinable by this court upon every applicable principle of general law. We shall presently show that the limitations upon the jurisdiction of this court as to writs of error from the state courts restrict its jurisdiction to a narrow field, limit it to federal questions, and exclude it from review-

ing the judgments of the state courts whenever they are based or are sustainable on "independent grounds" of general law.

We desire, however, to be distinctly understood that, whether there is any such rule in the federal court as counsel contends for or not, the decision of the circuit court of the United States in Marshall and Illsley cases did not proceed upon such a rule. It was made upon the ground which we have indicated. Judge NELSON, in delivering the opinion, expressly says that the case falls within the rule laid down in *City* v. *Lampson*, 9 Wall. 477, which decision was, in substance, as follows: Where bonds were in the hands of *bona fide* holders for value, and are valid by the judicial decisions of a state when issued, subsequent decisions in the same state cannot destroy their validity in *such* hands; that is, in the hands of *bona fide* purchasers for value.

In *Gelpcke* v. *Dubuque*, 1 Wall. 206; *Taylor* v. *Ypsilanti*, 105 U. S. 60; *Township* v. *Talcott*, 19 Wall. 673; *Alcott* v. *Supervisors*, 16 Wall. 678; *Havermeyer* v. *Iowa County*, 3 Wall. 294; *Mitchell* v. *Burlington*, 3 Wall. 270; *County* v. *Rogers*, 7 Wall. 103; *Green County* v. *Conness*, 109 U. S. 104; *Douglass* v. *Pike County*, 101 U. S. 667; *County* v. *Douglass*, 105 U. S. 104,—the plaintiffs were *bona fide* holders of the bonds in suit. In the case of *County* v. *Rogers*, 7 Wall. 103, the court, by Justice NELSON, says:

"We regret the difference of opinion on the subject of these bonds between this court and the courts of the state of Iowa, but it involves a principle and rule of property, in our opinion, so just and so essential to the protection of the rights of *bona fide holders* of this class of securities," etc.

Again:

"That difference, as we understand it, consists in this: This court, in *Gelpcke* v. *The City of Dubuque*, held that bonds issued by counties, cities, or towns, which bodies at the time the bonds were issued were held in the settled adjudications of the highest courts of the state to possess the power, under its constitution and laws, to issue the same, are valid and binding upon the body issuing them, in the hands of a *bona fide* holder. Since these bonds were issued and in the hands of *bona fide* holders for value, the courts of Iowa have reversed their previous decisions," etc.

In *Green County* v. *Conness*, 109 U. S. 104, which is one of the latest cases on the subject, the supreme court sums up the doctrine as follows:

"Such being the condition of the law on this subject down to April, 1878, we do not feel inclined to reconsider our former rulings, and follow the later decisions of the supreme court of the state, where this whole line of cases are substantially overruled. The bonds involved in this suit were all in the hands of innocent holders when the law of the state was so materially altered by its courts. In our opinion the rights of parties to this action are to be determined by the law as it was judicially construed to be when the bonds in question were put on the market as commercial paper."

We are confident that there is not a single decision in the supreme court of the United States which holds that the original taker of bonds, under the contract itself with the municipality, is protected from having his bonds avoided by a subsequent decision of the state court, changing a previous rule, and holding their issue to have been invalid. But, if there is such a decision, it does not apply to this case, because, as we shall show, there was no rule on the subject recognized or established by the supreme court of Minnesota, or by any court of the state, when the contracts between the Plainview Railroad Company and the towns were entered into and fully performed.

It is clear, therefore, that the decision of the United States court rested, and must rest, on the peculiar rights of Marshall and Illsley as purchasers of negotiable paper.

We shall show in another connection that the circuit court entirely misconceived the decision of the supreme court of Minnesota of the *Highland Case*, not only as to what was held, but as to the time when that suit was commenced and decided relatively to the dates when the alleged contract was made between the towns and the Plainview Company.

In his brief on the motion to dismiss, the counsel for the plaintiff in error asserts that—

"The Minnesota supreme court expressly decided that the recitals in the bonds were such as put all takers, including, of course, Marshall and Illsley, 'upon inquiry as respects the authority under which such bonds were entitled to be issued, and the manner in which they were in fact issued. As we [the court] construe the bonds, there-

fore, all purchasers are chargeable with notice of the invalidity thereof by the recitals.'"

This statement of what the supreme court of Minnesota said is ingenious, but it is not ingenuous. The foregoing quotation from the opinion of the supreme court of Minnesota is merely introductory to what it did say, and to what it did decide. That court proceeds, (Plainview Record, fol. 281:)

"(2) In our opinion the recitals in the bonds were sufficient to put the purchasers, Marshall & Illsey, or others upon inquiry as respects the authority under which such bonds were entitled to be issued, and the manner in which they were in fact issued. As we construed the bond, therefore, all purchasers are chargeable with notice of the invalidity thereof by the recitals.

"(3) Marshall & Illsey, however, brought suit upon the coupons of these bonds as they matured, and recovered thereon in the circuit court of the U. S. for the district of Minnesota in a sum less than $5,000, and the bonds have been duly adjudged and determined in a trial upon the merits in that court to be valid in their hands.

"For the purposes of this case, we are unable to see that it is material for us to inquire into the particular grounds of the decision of that court, as the result of the judgment is in any event to make the bonds valid, negotiable securities, held by Marshall & Illsey as *bona fide* purchasers.

"In other words, it is sufficient to say that court differs with this court upon the question of the validity of the bonds, and accordingly adjudges the holders entitled to recover thereon, and notwithstanding the recitals therein.

"The result would be the same if that court had differed with this court on questions of facts resting upon evidence *dehors* the bonds, as to their execution, or the *bona fides* of their transfer to the present holders; and, the Plainview Co. and defendant not having been parties to that action, this plaintiff is not estopped from litigating the question involved in this case in the state courts.

"The judgment of the circuit court cannot be reviewed or modified by the state courts; and it is not questioned, as we believe, in this case, that the result of the decision and judgment of the circuit court is to fix irrevocably the liability of the town for the whole amount of the indebtedness evidenced by the bonds.

Beloit v. *Morgan*, 7 Wallace, 619.

"It must therefore be deemed to have been conclusively settled that the bonds have been transferred to parties in whose hands they have become valid and legal obligations against the plaintiff town.

"On the other hand, it was also conclusively determined that the

bonds were void in the hands of the Plainview Co. by the judgment of this court in the *Harrington Case*. Upon that question the Plainview Co. had its day in court in the case referred to, and the issuance and disposition of the bonds must be treated by the state courts as unlawful and wrongful, and it is immaterial that the agents of the company entertained mistaken views of their legal rights in the premises.

Comstock v. *Hier*, 73 N. Y. 275.

"If it be conceded that these bonds, when once placed on the market, were liable to pass into the hands of purchasers who would be entitled to enforce the same as valid, negotiable securities in the U. S. courts, as the result in this case has proved, it must necessarily follow, we think, that plaintiff has a cause of action for damages. Of course the extent of the injury would depend upon the result of the negotiation of the securities, and in any particular case courts might differ in their determination of the question whether or not the purchasers were *bona fide* holders, evidence upon either *dehors* or appearing on the face of the instruments.

"If these bonds had not indicated the provisions of the statute under which they were issued, the plaintiff would have been entitled to an injunction to restrain the negotiation thereof; and, if negotiated in the same manner as they have been and purchased by the same parties, plaintiff's right of action for the face value of the bonds and interest would be unquestioned.

"*Comstock* v. *Hier, supra.*
"*Thayer* v. *Manley*, 73 N. Y., 308.

"But in their practical results the case supposed and the case at bar are alike. The Plainview Co. transferred the same for full value, in payment for moneys advanced for building the road, and Marshall & Illsley paid nearly par for them. They were treated by all parties as valuable commercial securities, placed on the market and sold, and enforced as such against the defendant."

Justices GILFILLAN and DICKINSON, in a separate opinion, say, (Plainview Record, fol. 290:)

"We concur in the conclusion expressed in the foregoing opinion, but we would base the responsibility of the Plainview Company distinctly upon the following considerations:

"That company having procured the unauthorized execution and delivery to itself of these bonds, in form expressing the obligation of the town, and having negotiated the same, so that they have thus come into the hands of parties who have enforced a recovery upon them by proper action in a competent tribunal, the corporation is answerable for its own unauthorized acts, which have resulted in this

injury to the town, unless this consequence—the recovery upon the bonds—is to be deemed too remote to afford a ground of legal liability. As respects the acts of the Plainview Company, this injurious consequence is not remote, but proximate. The damage suffered by the town consists in its being compelled to pay these bonds; but that is just what the Plainview Company must be deemed to have contemplated when it negotiated for, procured, and disposed of the bonds. No other purpose or object can be ascribed to it than that, either in its own hands or in the hands of future holders, the bonds should be paid by the town, voluntarily or by legal compulsion. One charged with responsibility for his own acts, resulting in injury to another, should not be heard to say that the injurious consequence is too remote to subject him to liability if he actually contemplated that consequence, although others might not have anticipated such a result. That the judgment by which the liability of the town to pay the bonds has been conclusively established was erroneous does not make remote the damage thus resulting to the town, if this result—the enforcement of the bonds—was within the purpose of the company when it procured and negotiated them as the obligations of the town. It is argued that the company could not have anticipated an erroneous decision, and should not be held liable for the consequences of such a decision. Probably it did not anticipate or suppose that an adjudication holding the town obligated to pay the bonds would be erroneously made, for it may have supposed the bonds to be valid and rightfully enforceable; but the fact that it did not suppose that such an adjudication would be erroneous does not make remote the damage complained of. It is proximate, and liability follows because the company procured and negotiated these unauthorized securities as the obligations of the town, to be enforced as such, and because they have been so enforced in a court having jurisdiction, as the corporation anticipated they would be."

So that the supreme court of Minnesota did not decide—did not *adjudge*—that the recitals in the bond were notice to Marshall and Illsley. That point was not before the court. What it said *arguendo* is not to be considered. Directly contrary had been the judgment of the United States circuit court as to the effect of the recitals as to Marshall and Illsley. To that judgment full faith and effect were given. The supreme court of Minnesota declared, in substance, that, while it differed in opinion from the circuit court, yet that the question was settled in favor of Marshall and Illsley by the judgments of that court. Had the supreme court *decided* as counsel for the plaintiff in error contends it did, it would have adjudged the bonds void in the hands of Marshall and Illsley, notwithstanding the judgment of the United States circuit court, and would

then have done precisely what it did not, viz., refused to give faith and credit to that judgment. What the supreme court said was argumentative; or, rather, it said, in substance, that notwithstanding these would be our views were we at liberty now to so adjudge, yet we cannot give them in these cases judicial force, for the reason that we are bound by the constitutional obligations to give "full faith and credit" to the judgments of the circuit court.

The reasons why the supreme court of Minnesota did this are not material. Its expressed reluctance or dissent *arguendo* is not material. None of its reasons, criticisms, dissents, or arguments, whether correct or incorrect, are material if its judgment was correct.

The counsel for the plaintiff in error, upon the motion to dismiss, discussed at large the effect of the recitals in the bonds. We maintain that such effect was determined as to Marshall and Illsley, by the United States circuit court.

"The recitals in the bonds are conclusive evidence *in favor of the plaintiffs*, who purchased without other information than that which appears upon their face, that all the conditions precedent prescribed in the law had been complied with."

(NELSON, J., Plainview Record, fol. 62.)

This does not hold that the recitals would be "conclusive evidence," or any evidence, in favor of the Plainview Company in suits between the towns and it. In such case they would, upon all the authorities, have no binding force. (See cases cited *post*, under point III.) There was no such question in the Marshall and Illsley cases.

However this may be, the supreme court of Minnesota has held as an "independent ground of decision" that the question as to the effect of the recitals, and every other defense to the bonds, as against Marshall and Illsley, were settled by the judgment of the circuit court of the United States in their favor.

We do not regard any discussion as to these recitals at all pertinent at this time. Anticipating, however, as we must, that the question will be raised, we submit the following considerations:

It is to be presumed that the law has been complied with; that public officers have proceeded according to law. In case of two modes of procedure prescribed by a statute, one valid, the other invalid, this presumption of regularity prevails unless the bond shows on its face that the invalid procedure was pursued.

We cannot better illustrate this principle than by the language of the supreme court of Minnesota, in regard to these very bonds, in *Harrington* v. *Plainview*, 27 Minnesota, pages 224, 226.

The court says:

"The point is also made that it is not a proper case for injunction, because, if the statute is unconstitutional and gives no authority to issue the bonds, their invalidity will appear on their face, and there will always be a legal defense to them in whosesoever hands they may come. If, by recital of the act under which they issue, their invalidity *must appear* on their face, so that there could be no *bona fide* holder of them, an injunction will not lie to restrain their issuance. *Township of East Oakland* v. *Skinner*, 94 U.S. 255. But, if the act be valid, a mere recital in the bond that it was issued under and pursuant to such act, without any further recital, is sufficient, so that a *bona fide* holder will be protected although there may have been a defect in the proceedings under the act to authorize the officers to issue the bonds. *Humboldt Township* v. *Long*, 92 U. S. 642. If the act in question here were wholly void, and no valid bonds could be issued under it, the case would fall within the former of the decisions. But the act provides two modes for authorizing the issue of the bonds, one of which is conceded to be valid, and the other is claimed to be invalid. We do not think the bond need recite under which of these provisions it is issued. It is enough to refer to the act generally, and a purchaser would have the right to presume that it was issued under the valid provisions of the act.

"There might therefore be *bona fide* purchasers of the bonds. It is a proper case for injunction."

Humboldt Township v. *Levy*, 92 U. S. 642.

Town of Coloma v. *Evans*, 92 U. S. 484.

Marcy v. *Town*, 92 U. S. 639.

Burr v. *Chariton Co.*, 12 Fed. Rep. 848.

Moulton Co. v. *City of Evansville*, 25 Fed. Rep. 382.

The recitals in these bonds contain no such statements as these authorities require to impute notice.

The recital is as follows: "This bond is issued in pursuance of a mutual agreement between the said town and the said R. R. Co., which agreement was made in accordance with the laws of the state of Minnesota, and through and by a proposition made by said railroad company, and duly accepted by said town upon petition therefor, signed by a majority of the resident tax-payers of said town; said agreement having been fully performed by the R. R. Co. on its part."

We observe, first, that the question as to the effect of this recital is *stare decisis* by the decision of the United States circuit court.

It was one of the principles upon which that court rendered its decision.

Marshal v. *Elgin*, and *Marshal* v. *Plainview*, 8 Fed. Rep. page 783, and page 786, opinion.

Page 786:

"These cases are tried together without a jury. The only matters relied on in defense are:

"'*First*. That the provisions of chapter 106, Gen. Laws Minnesota 1877, and particularly of section 7, under which the bonds and coupons issued, were unconstitutional and void.

"'*Second*. That the decision of the supreme court of Minnesota in the case of *Harrington* against *The Plainview Railroad Co.* is conclusive and binding, in respect to the first point, upon the federal courts, as an exposition and construction of the constitution of the state of Minnesota.'

"The view taken by the court will render it necessary to consider only the second defense urged. The following propositions must control the decision:

"'*First*. The recitals in the bonds are conclusive evidence in favor of the plaintiffs, who purchased without other information than that which appears upon their face, that all the conditions precedent prescribed in the law had been complied with.

"'*Second*. If the law under which the bonds were issued had been sustained and recognized as valid by the highest court of the state at the time, no subsequent act of the judiciary can impair their validity in the hands of the plaintiffs.'

"The bonds on their face refer to the law under which power to issue them was given to the legislature, and the coupons, though detached, are described with sufficient certainty in the complaint, and the evidence is plain that they belonged to the bonds issued. If the bonds are valid obligations, the coupons are identified, and follow the bonds, so that, if the second proposition can be applied, the plaintiffs are entitled to recover."

Were the question now an open one, no other conclusion could be reached. The recitals expressly state that the agreement was made in accordance with the laws of the state of Minnesota; that the agreement was made through and by a proposition made by the said railroad company, and duly accepted by said town; that the bond is issued in pursuance of authority given for that purpose by the laws of the state of Minnesota.

Nothing can be more explicit than these statements, nor is there anything in the bonds which, properly considered, at all qualifies them. The words, "upon petition therefor, signed by a majority of the resident tax-payers," cannot have this effect, because such words are not inconsistent with an election. It will be presumed that there was also an election. (See language of the supreme court of Minnesota in the *Harrington Case*, *ante*.)

If these words last quoted have such a destructive effect, it follows, in express contradiction of the recital, that the agreement was not made in accordance with the laws of the state of Minnesota, that no proposition was duly accepted, and that the bond was not isssued in pursuance of authority given by such laws.

Thus a mere inferential surmise is permitted to destroy statements of explicit and pointed asseveration often repeated.

Under the recitals in these bonds, (for the court will remark that they contain no recital that there was no election) a *bona fide* holder would have the right to presume that there was an election.

Royal British Bank v. *Turquand*, 88 Eng. Com. Law, page 325, (affirming S. C. 85 Com. Law, page 248.) The statute limited the powers of the company to acts authorized by the deed of settlement. This deed authorized the borrowing *of such sums* as should from time to time be authorized to be borrowed by a general resolution of the company. The only resolution was one which authorized the directors to borrow such sums as they should deem expedient.

The court declined to pass definitely on the question whether this was a sufficient resolution, and placed its decision upon the presumption, saying, (JARVIS, J.:)

"Finding that the authority might be made complete by a resolution, he would have the right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done."

Burr v. *Chariton County*, 12 Fed. Rep. 848, was a case where the charter of the railroad company granted to it the privilege to obtain county subscriptions.

At the time this charter was granted there existed a special act, applicable to the defendant county, that, whenever Chariton county should wish to subscribe to the stock of any railroad company, the county court shall cause an election to be held, and, if a majority of the tax-payers so vote, the county shall subscribe, and the county court was prohibited by the act from taking stock unless the subscription was so voted for.

The proceedings under which the bonds were issued were had, not under this special act, but under the charter of the said railroad company, and it was claimed that they were void for that reason.

The bonds recited on their face that they were issued under the authority conferred by the charter of the company.

Per Curiam, (KREKEL, J.:)

"The charter of the R. R. Co. granted to it the privilege to obtain county subscription, and the defendant county could avail itself of the opportunity to subscribe either under this power or the power granted by the special act, assuming that the latter was in force. Aside from all this, it has been held that the issuing of the bonds raises the presumption that all preliminaries, including the election required, have been complied with, and the *bona fide* holder is not bound to look beyond the question of power.

"*City of Lexington* v. *Butler*, 14 Wallace, 283.
"*Flagg* v. *Palmyra*, 33 Mo. 440.

"There is an abundance of power, as claimed by either party, to issue bonds. The recital in the bonds that they were issued under special authority granted by the charter might be erroneous; yet, if the special act authorized the issue of them, it is sufficient.

"The question is, did the power exist? Whether the source thereof was correctly pointed out can make no difference. But it is said that the provisions of the special act define who shall vote, and that these have not been complied with. The answer is that the tribunal—the county court—was by law made the judge of such matters, and, when they issued the bonds, innocent holders had the right to presume that all preliminary requirements had been complied with. The objections urged against the validity of the bonds are not that there was no power to issue them, but that no power existed under the charter, because the special act limits the power there granted. The defendant county, urging this objection, can only do so upon the ground that the special act is in force. If so,

there existed power to issue the bonds; and, the same having been issued, the law will attribute the exercise of the authority to the true source in the furtherance of justice and good faith."

We would also invite the court's attention especially to *Moulton* v. *City of Evansville*, 25 Fed. Rep. 382.

"Suspicion of defect of title, or the knowledge of circumstances which would excite suspicion in the mind of a prudent man, as gross negligence on the part of the taker, at the time of the transfer, will not defeat his title."

Murray v. *Lardner*, 2 Wall. 110.

"As with other negotiable paper, mere suspicion that there may be a defect of title in the holder, or knowledge of circumstances which could excite suspicion in the mind of a prudent man, is not sufficient to impair the title of the purchaser. That result will only follow when there has been bad faith on his part."

Cromwell v. *County of Sac*, 96 U. S. 58.

In this case the question was also considered whether overdue and unpaid coupons, attached to a municipal bond which had several years to run, rendered the bonds and coupons dishonored paper, so as to subject them in the hands of the purchaser for value to defenses good against the original holder.

The court held that this had no such effect; and this view was adhered to in the subsequent case of *Railway Company* v. *Sprague*, 103 U. S. 756.

See, also:

Swift v. *Tyron*, 16 Peters, 1.
Goodman v. *Simonds*, 20 How. 343.
Pittsburgh v. *Neal*, 22 How. 96.

That these bonds are negotiable paper, and that the purchaser is not bound to make a critical examination in order to escape the imputation of bad faith in the purchase, and that the burden of proof is on the party who asserts want of *bona fides*.

See, also:

1 Wait's Actions and Defenses, 688, 689, and cases cited.

It is not maintained by us that the town board had authority to construe the constitution. We simply claim that there was no lack of

authority to issue these bonds, provided the board followed the valid provisions of the law; that the recital gives the purchaser the right to presume that the constitutional method was pursued, and not the unconstitutional.

The judgment of the circuit court of the United States is not only an estoppel, as between the town and Marshall and Illsley, as to the bonds and coupons sued on in that action, but is conclusive as to the validity of the entire issue of the bonds.

Beloit v. *Morgan*, 7 Wallace, 619.

In that case Morgan brought suit on the coupons of some of his bonds, and recovered judgment. He then brought other suits on other of the bonds, but not the same specific instruments, as those on which he had obtained judgment.

Thereupon the town of Beloit filed a bill in the circuit court of the United States to enjoin the suit at law, and to compel a surrender of the bonds.

The answer to the bill set up the first judgment (on the coupons) as an estoppel. The court sustained this estoppel, holding that—

"It is conclusive not only as to the *res* of that case, but as to all further litigation between the same parties touching the same subject-matter, though the *res* may be different. It extends not only to the questions of fact and of law which were decided in the former suit, but also to the grounds of recovery or defense which might have been, but were not, presented."

Such estoppels extend to privies, and as all subsequent owners of these bonds must claim under Marshall and Illsley, in whose favor these judgments were rendered, the estoppel inures to them.

But it may be said that, when these bonds mature in the course of 20 years, the amount will be so great as to allow a writ of error to the supreme court of the United States. Not necessarily so, and affairs will never be in that situation. These bonds are for $500 each. The holder can bring successive suits for less than $5,000

each, or several holders may bring suits for less than that amount each, and there can never be a writ of error.

But a more decisive answer is that, the estoppel having become perfect by the adjudication of a court of competent jurisdiction, it is not impaired by the fact that some appellate court may possibly reverse the judgment.

The defeated party is not bound to prosecute an appeal or to resist a suit. *Buck* v. *Kent*, 3 Vt. 99. He can acquiesce in the estoppel or in the liability, (21 Am. Dec. 577,) and make it the basis of any other remedy he has.

So in the case of *Winona* v. *Thompson*, 24 Minn. p. 198, the supreme court of Minnesota evidently assumed that the judgment in favor of Cowdery upon the coupons was an estoppel as to the entire issue and as to the future suits.

See, also:

State v. *Torinus*, 28 Minn. 179.

Further, we say that the Plainview Railroad Company, having been the instrument by which these bonds were placed in the market, and thereby came into the hands of *bona fide* purchasers, cannot, after the towns have been sued on them and been compelled to pay, turn around and say to the towns, "The bonds are not valid in the hands of the purchasers; you have a defense at law to them." But the railroad company is estopped to deny their validity in the hands of the purchasers. It was the railroad company that put it in the power of purchasers to sue the towns and recover. To illustrate: A. holds B.'s note, which it is his duty to deliver up, but, instead of delivering it up, he sells it to C., and informs C. that he has no right to sell it to him, and tells him why; so C. is not an innocent purchaser. C. sues B., and proves by false evidence that he is an innocent purchaser, and procures judgment against B., who pays the judgment, and sues A. for transferring the note. A. defends, and sets up the fact that he informed C., when he purchased the note, of all the facts invalidating the note, and that C. was not an innocent purchaser, and had no right to recover. Can A., who placed it in C.'s power to defraud B. and injure him, now turn around, and say the court made a wrong decision when it held C. an innocent purchaser? As well might he justify his acts by saying that B. em-

ployed poor counsel to defend him. The fact is that, when A. placed it in the power of any one to imperil the rights of B., he became liable to him in damages; and whoever became the owner, and recovered by whatever means, that fact only made the amount of damages certain. The cause of action arose when the note was transferred.

3 Vt. 82.
21 Am. Dec. 573.

So, in the present case, when the railroad company placed these bonds on the markets of the world, it placed it in the power of some one to injure these plaintiffs. The *gravamen* of the action was the wrongful transfer, not the subsequent recovery by Marshal and Illsley against the town. That merely fixed the amount of damages to a certainty. The cause of action arose the moment the bonds passed out of the hands of the railroad company. By that act of transfer Marshall and Illsley were enabled to procure the bonds and bring their suit, and that suit has forever fixed the liability of the towns, and the consequent injury to the plaintiffs by the transfer.

If that decision had never been made, we would be entitled to damages to the amount of the bonds, for it is sufficient that the towns might be damaged. This proposition we shall presently discuss, when we come to consider our proposition that the judgment of the supreme court of Minnesota proceeded and is sustainable on a "ground independent" of the Marshall and Illsley judgments.

As to the cases cited on behalf of the plaintiff in error on motion to dismiss, and which will doubtless be cited on this hearing.

Angle v. *Northwestern Mutual Life Insurance Co.*, 92 U. S., is not applicable. In that case a negotiable instrument bore on its face material alterations by erasures, and parts that had been left blank were filled with stipulations clearly repugnant to what was plainly and clearly expressed in the instrument. In *McClure* v. *Town of Oxford*, 92 U. S. 429, there was no law in effect under which the bonds could have been issued in any way, shape, or manner. They contained recitals that they were issued under the act of the legislature of Kansas approved March 1, 1872, and in pursuance of a vote of the qualified electors of the township at an election held therein April 8, 1872. The statute, by its terms, took effect only

from its publication in certain newspapers, and it was not published until March 21, 1872, and the election was not held pursuant to notice of thirty days, as required by the act.

This is a very different case from those at bar.

The bonds here are issued under a statute which provided two methods by which they might be issued, the one constitutional, and the other unconstitutional; and, as we have shown elsewhere, the bonds having been put out as commercial paper, purchasers had the right to infer from the recitals that the constitutional method had been pursued.

In *School-District* v. *Stone*, 106 U. S. 183, the recital was that the bonds were "issued by the board of school directors by the authority of an election of the voters of the said school-district held on the 31st day of July, 1869, in conformity with the provisions of chapter 98 of Acts 12th General Assembly of the State of Iowa." The constitution of the state of Iowa provided that "no county or other political or municipal corporation shall be allowed to become indebted in any manner, or for any purpose, to an amount in the aggregate exceeding five per centum on the value of the taxable property within such county or corporation, to be ascertained by the last state and county tax-lists previous to the incurring of such indebtedness."

The assessed value of the property immediately preceding the issue of the bonds was $47,986. The bonds amounted to $15,000, and this was the defense of the district. The court held, in substance, that recitals in a bond do not necessarily nor distinctly import any determination of that question by the district officers invested with authority, under certain circumstances, to issue them. It states:

"Had the bonds recited that they were issued by authority of the election of July 31, 1869, *and* in conformity with the provisions of the statute referred to, there would, in view of the decisions of this court, be more force in the argument in behalf of the defendant in error. . * * * Numerous cases have been determined in this court, in which we have said that where a statute confers power upon a municipal corporation, upon the performance of certain precedent conditions, to execute bonds in aid of the construction of a railroad, or for other like purpose, and imposes upon certain officers, invested with authority to determine whether such conditions have been performed, the responsibility of issuing them when such conditions have been complied with, recitals by such officers that the bonds have been

issued 'in pursuance of,' or 'in conformity with,' or 'by virtue of,' or 'by authority of,' the statute, have been held, in favor of *bona fide* purchasers of value, to import full compliance with the statute, and to preclude inquiry as to whether the precedent conditions had been performed before the bonds were issued. But in all such cases, as a careful examination will show, the recitals fairly imported a compliance, in all substantial respects, with the statute giving authority to issue the bonds."

County of Bates v. *Winters*, 97 U. S. 83, and *Harshman* v. *Bates*, 92 U. S. 569, involved the same bonds. They were executed to the Lexington, Lake & Gulf Railroad Company, and stated upon their face that they were issued, pursuant to a certain act of the legislature of Missouri, upon a proposition to subscribe $90,000 to the capital stock of the Lexington, Chillicothe & Gulf Railroad Company, which last company had been consolidated with the Pleasant Hill Division of the Lexington & Chillicothe Railroad Company, under the name of the "Lexington, Lake & Gulf Railroad Company." It was maintained that the last-named company, as provided by law, and under the terms of the consolidation, possessed all the powers, rights, and privileges, and owned and controlled all the assets, subscription bonds, and moneys and property whatsoever, of the two several companies forming said consolidation, or either one of them.

The court held in the *Harshman Case* that the extinction by such consolidation of the company in whose favor subscription was authorized worked a revocation of the law, which authorized the county court to make the subscription. No subscription had been made at the time of the consolidation, and no vested right had accrued to the company. The consolidation

—"May transfer the vested rights of one railroad company to another, upon a consolidation being effected; but it does not continue in existence powers to subscribe for stock given by one person to another, which, by the general law, are extinguished by such a change. It does not profess to do so, and we think that it does not do so by implication.

"As sufficient notice of these objections is contained in the recitals of the bonds themselves to put the holder on inquiry, we think that there was no error in the judgment of the circuit court."

In the case of *County of Bates* v. *Winters*, this court followed *Harshman* v. *Bates County*.

In the brief on the motion to dismiss, it is asserted repeatedly that the supreme court of Minnesota held that the "transferee of the bonds could stand in no better position than the transferrer."

That court did not so hold. What it *held* was its *judgment*, which, by giving "full faith and credit" to the judgments of the United States circuit court, resulted in placing Marshall and Illsley in a "better position" as to the towns than the Plainview Company could occupy. This clearly appears in the opinion.

"Marshall and Illsley, however, brought suit upon the coupons of these bonds as they matured, and recovered thereon in the circuit court of the United States for the district of Minnesota in a sum less than $5,000; and the bonds have been duly adjudged and determined, in a trial upon the merits in that court, to be valid *in their hands*.

"*For the purposes of this case we are unable to see that it is material for us to inquire into the particular grounds of the decision of that court, as the result of the judgment is, in any event, to make the bonds valid, negotiable securities, held by Marshall and Illsley as bona fide purchasers.*"

(Plainview Record, fols. 281, 282.)

"That the judgment by which the liability of the towns to pay the bonds has been conclusively established was erroneous does not make remote the damage thus resulting to the town, if this result—the enforcement of the bonds—was within the purpose of the company when it procured and negotiated them as the obligations of the town."

(GILFILLAN, C. J., Plainview Record, fol. 291.)

In considering the judgments in favor of Marshall and Illsley, the supreme court of Minnesota held that, because they were final and conclusive between them and the towns, therefore a case of liability of the Plainview Railroad Company, and of its successor in obligation, the plaintiff in error, was made out in favor of the towns, because the act of the Plainview Company in putting the bonds on the market had enabled *bona fide* purchasers to obtain judgments against the towns. In thus holding, that court based its decision on "an independent ground, and broad enough to maintain the judgment," independently of any federal question that may have been in the case.

The question as to the effect of the Marshall and Illsley judgments reduces itself to this: If the judgments in favor of Marshall and Illsley were entitled to be given full faith and credit in these suits be-

tween different parties, they were given such faith and credit. The duty of the state court in that respect was fully performed, and this court has no jurisdiction. This court has clearly so held.

"Here is clearly a right or privilege claimed by respondent under a statute of the United States, within the meaning of Rev. St. § 709; and, had the judgment of the supreme court of Missouri been adverse to his claim, there could be no doubt of his right to a writ of error from this court to review its ruling. It is insisted, however, that the relator had no right to a review of the ruling in favor of respondent, as he claimed no right or privilege personal to himself, or to his own *status* as a citizen, from such statute. The question thus presented is whether the right or privilege must necessarily be personal to the plaintiff in error, or whether he is not entitled to a review, where such right or privilege is asserted by his opponent, and the decision is in favor of such opponent, and adverse to himself. While there is some force in the argument that the right of review in cases involving the construction of a federal statute should be mutual, the act limits such right to cases where the state court has decided *against* the title, right, privilege, or immunity set up or claimed under the statute. Now the only claim made under the federal statute in this case is by the respondent. The difficulty with the position of the relator is that he asserts no right under the statute, but, to establish the alleged alienage of the respondent, relies solely upon the fact that the latter was born abroad. To this respondent replies, admitting his foreign birth, but claiming that the statute makes him a citizen, and the state court has adopted his view.

"The object of the present judiciary act was not to give a right of review wherever the validity of an act of congress was drawn in question, but to prevent the courts of the several states from impairing or frittering away the authority of the federal government, by giving a construction to its statutes adverse to such authority. Of course, if the construction given by the state court to the act under which the right is claimed be favorable to such right, no such reason exists for a review by this court. As stated by Chief Justice TANEY in *The Commonwealth Bank* v. *Griffith*, 14 Pet. 56, 58, 'the power given to the supreme court by this act of congress was intended to protect the general government in the free and uninterrupted exercise of the powers conferred on it by the constitution, and to prevent any serious impediment from being thrown in its way while acting within the sphere of its legitimate authority.' The right was therefore given to this court to re-examine the judgments of the state courts, where the relative powers of the general and state government had been in controversy, and the decision had been in favor of the latter.

"The question is by no means a novel one in this court. The case of *Fulton* v. *McAffee*, 16 Pet. 149, was an action of ejectment, in which the lessor of the plaintiff made title under a certificate issued

to him as assignee of Jefferson College, the trustees of which college were authorized by an act of congress to relinquish certain lands which had been reserved for their use. Defendant offered testimony to show that the certificate was fraudulently obtained, that its authority had been denied by the commissioner of the land-office, and consequently that it did not confer on the lessor of the plaintiff a valid legal title upon which he could recover in ejectment. These questions were decided by the state court in favor of the right claimed by the plaintiff, and the defendant took a writ of error from this court. It was held that, as the decision of the state court was in favor of the right claimed, this court had no jurisdiction.

"The case of *Linton* v. *Stanton*, 12 How. 423, was an action upon certain promissory notes, to which the defendant pleaded a discharge under the bankruptcy law. Objections were taken to the validity of the discharge, but they were overruled by the court, and judgment entered for the defendant. It was held the plaintiff had no right to a review in this court. 'Undoubtedly,' says Chief Justice TANEY, 'the defendant, in pleading his discharge under the bankrupt law, claimed a right or exemption under a law of congress. But, in order to give jurisdiction, something more is necessary; the judgment of the state court must be against the right claimed.' Like rulings were made in *Gordon* v. *Caldcleugh*, 3 Cranch, 268; *Strader* v. *Baldwin*, 9 How. 261; *Burke* v. *Gaines*, 19 How. 388; *Hale* v. *Gaines*, 22 How. 144; *Reddall* v. *Bryan*, 24 How. 420; and *Ryan* v. *Thomas*, 4 Wall. 603.

"None of the cases cited by the relator involve the question here presented, and the writ of error must be dismissed for want of jurisdiction."

Missouri v. *Andriano*, 138 U. S. 496, 499.

"Jurisdiction to review the final judgment rendered in this case cannot be maintained upon the ground of the denial by the state courts of any title, right, privilege, or immunity claimed under the constitution or some treaty or statute of, or commission held or authority exercised under, the United States, as the plaintiff in error set up and claimed none such. *Spies* v. *Illinois*, 123 U. S. 131, 181; *Chappell* v. *Bradshaw*, 128 U. S. 132. And the decision that the defendant was not liable in damages, because in concurring in the order complained of he acted in his judicial capacity, in itself involved no federal question. *Lange* v. *Benedict*, 99 U. S. 68, 71. Nor can the plaintiff object that the validity of a statute of, or an authority exercised under, the United States was drawn in question, or that a title, right, privilege, or immunity was claimed under the constitution or a statute of, or a commission held or an authority exercised under, the United States, on the ground that the defendant claimed to exercise an authority under acts of congress, or under a commission held under the United States, since this was not the

plaintiff's contention, but the defendants'; and the state courts decided not against, but in favor of, the authority, title, right, privilege, or immunity so claimed."

Manning v. *French*, 133 U. S. 186, 191.

If, on the contrary, the judgments in favor of Marshall and Illsley were, as judgments between other parties, merely an element of fact in the plaintiff's case showing damages, or tending to measure damages, or showing that the obligation of the towns to *bona fide* holders had been judicially determined, then and in that case the supreme court of Minnesota recognized them for such purposes, and thus based its decision as to them upon one of several "independent grounds of decision;" in which case a writ of error does not lie to this court.

"The case was decided against the plaintiffs in error on an independent ground, not involving a federal question, and broad enough to maintain the judgment. In such case, even though the state court also decides a federal question against the plaintiffs in error, the court dismisses the writ of error without considering the federal question. *Marron* v. *Brinkley*, 129 U. S. 178, 181; *Hale* v. *Akers*, 132 U. S. 554, 565, and cases there cited; *San Francisco* v. *Itsell*, 133 U. S. 65, 66; *Hopkins* v. *McLure*, 133 U. S. 380, 386."

Beatty v. *Benton*, 135 U. S. 244, 254.

See, also:

Beaupre v. *Noyes*, 138 U. S. 397, 401.
Hopkins v. *McLure*, 133 U. S. 380.
Cook County v. *C. & C. Canal & Dock Co.*, 138 U. S. 635.

The "independent grounds" of decision appear in the opinion of the supreme court of Minnesota. (Plainview Record, fols. 173, 292.) Such ground or principle is, in substance, that if any negotiable bond or instrument, void in the hands of the original payee, is transferred by the payee, and by the transfer the bond or negotiable instrument is thereby made a binding obligation against the maker, the maker can sustain an action against the payee, and the measure of damages is the amount the maker has been compelled to, or will be compelled to, pay by reason of said transfer.

This is a common-law principle. It involves no federal question,

and it is amply sustained by many authorities. It has long been the settled law of Minnesota.

City of Winona v. *Thompson et al.*, 24 Minn. 198.
City of Winona v. *Minnesota Rwy. Construction Co.*, 27 Minn. 415.

In those cases the bonds were left in escrow with Horace Thompson, to be delivered to the Minnesota Construction Company on their performing certain acts. The bonds were delivered to the construction company; they claiming that they had performed the conditions, and the city of Winona claiming the contrary. The construction company transferred them to one Cowdrey, a non-resident, who sued Winona in the United States circuit court, and that court held that the conditions had been performed, and that the bonds were a valid obligation against the city of Winona. The suit, like those of *Marshall & Illsley* v. *Plainview & Elgin*, was only on a few coupons.

Cowdrey v. *The City of Winona*, 3 Otto, 612.

After the decision in the *Cowdrey Case*, the city of Winona sued the Minnesota Construction Company and Horace Thompson in the courts of this state for a conversion of the bonds. The suit was dismissed as to Horace Thompson, and judgment rendered against the construction company for the amount of the bonds and interest; they having sold the bonds, and the city of Winona having to pay them.

See, also:

Decker v. *Matthews*, 12 N. Y. 313.
Murray v. *Burling*, 10 Johns. 172.
Thayer v. *Manley*, 73 N. Y. 305.
Hynes v. *Patterson*, 95 N. Y. 1.
Western R. R. Co. v. *Bayne*, 75 N. Y. 1.
Devlin v. *Coleman*, 50 N. Y. 531.
Comstock v. *Hier*, 73 N. Y. 269.
Stone v. *Clough*, 41 N. H. 290.
Badger v. *Hatch*, 71 Me. 562.
Pierce v. *Gilson*, 9 Vt. 216.
Buck v. *Kent*, 3 Vt. 99.
Towle v. *Lovet*, 6 Mass. 394.

Lucas v. *Haynes*, 2 Ld. Raym. 871.
Park v. *McDaniels*, 37 Vt. 594.
Spencer v. *Dearth*, 41 Vt. 98.
Neal v. *Hanson*, 60 Me. 84.
Inhabitants of Otisfield v. *Mayberry*, 63 Me. 167.
O'Donnell v. *Thompson*, 13 Ala. 440.
St. John v. *O'Connell*, 7 Porter, 466.
Fireman's Ins v. *Co.* v. *Cochran*, 27 Ala. 228.
Bleaden v. *Charles*, 7 Ring. 246.
Alsager v. *Close*, 10 M. & W. 576.
Kimball v. *Billings*, 55 Me. 147.
Hays v. *Riddle*, 1 Sandf. 248.
Evans v. *Kymer*, 1 Barn. & Adolph. 528.

Many of these authorities sustain our position that the right of action of the towns to recover damages in a sum equal to the face of the bonds, and interest from date of issue, became perfect the moment they passed out of the possession of the Plainview Company, and became then, or thereafter, by subsequent transfers, the property of a *bona fide* holder. So that it was not necessary for the supreme court of Minnesota, in order to sustain the judgments against the plaintiff in error, to base its decision in any degree upon the judgments in favor of Marshall and Illsley. They can be left entirely out of the case; and even then these judgments are sustainable upon common-law principles which present no federal questions.

This principle, resting upon such authorities, is expressed as to such cases, as follows:

"If the property be a chose in action, as a bill or note, or security for the payment of money, the measure of damages is, *prima facie*, the face of the bill or note."

2 Sedgwick on Damages, 419, (marg. p. 495.)

"Trover will lie by a maker for conversion of his note for which he has paid, or a note tortiously diverted from the use for which it was made. In such a case it is equally true that the maker may never be called on to pay the note; but that consideration does not prevent a recovery for the face of the note where the maker is exposed to injury to that amount."

2 Sutherland on Damages, 615.

"The maker of a promissory note can maintain an action for its conversion against one who, before it has any legal inception, wrongfully negotiates it to a *bona fide* holder for value. He is entitled to recover the full amount of the note as damages, without averring or proving that he has paid it to the holder. It is sufficient that he is legally liable to pay it. But where a note, having the plaintiff's name on it only as indorser, has been, as to him, fraudulently transferred to a *bona fide* holder, and has not yet matured, such indorser is not entitled to maintain an action before he has been called on for payment, or his liability made absolute. He is not deemed yet to have suffered any damage. Trover may be brought by the acceptor for the conversion of a paid bill of exchange. Nor is he confined to nominal damages. He is entitled to recover in respect of the risk of liability, although the bill is utterly valueless. The obligee in a bond may recover, in this action against the obligor, who tore off his seal; and the whole amount of the penalty, it appearing that the condition had been broken to the damage of the plaintiff to a still greater amount, in such a case no alternative can be given the defendant to deliver up the obligation in discharge of damages. It has been held that the owner may recover for the conversion of a bond the sum he would be entitled to recover on it from the obligor."

3 Sutherland on Damages, 521.

Again, the supreme court of Minnesota based its judgment on another ground, independent of the judgment in the Marshall and Illsley cases in the United States Circuit Court. That is, the Plainview Railroad Company originally received these bonds wrongfully. It had no right to them. It then sold them to the Chicago & Northwestern Railroad Company, and received in payment thereof the full face value, which was advanced to it by said company to build the road. Under these circumstances the towns of Plainview and Elgin had an election of remedies, namely, trover for the conversion of the bonds, or an action for the money received by the Plainview Railroad Company for the bonds, on the sale thereof to the Chicago & Northwestern Railroad Company; that is, an action for money had and received.

The supreme court of Minnesota held that the pleadings and findings of fact were sufficient to sustain the action for money had and received. On this ground it is immaterial whether the bonds ever passed into the hands of innocent purchasers or not. It is also immaterial whether Marshall and Illsley ever brought suit upon them, or on what ground the federal court based its judgment in the Mar-

shall and Illsley cases; for the suit is for money had and received on the sale of the bonds. The sale is therefore affirmed, and the town sued for the proceeds.

This involves no Federal question, and whether the judgment of the supreme court of Minnesota is right or wrong is immaterial, for the judgment on this ground is amply sustained by authority.

Comstock v. *Hier*, 73 New York, 269.
4 Wait's Act. & Def. 472, and cases there cited.

In basing the judgment upon this ground the supreme court of Minnesota said, (36 Minn. 514, 515, opinion by Mr. Justice VANDERBURGH:)

"The Plainview Company transferred the same for full value in payment for moneys advanced for building the road, and Marshall and Illsley paid nearly par for them. They were treated by all parties as valuable commercial securities, placed on the market and sold, and enforced as such against the plaintiff. If the bonds are invalid, and the Plainview Company acquired no title to them as obligations of the town, upon what principle can it claim to be entitled to the proceeds as its property?"

In *Comstock* v. *Hier*, *supra*, the court say:

"It would be illogical, conceding the invalidity of the notes in the hands of the defendants, and the non-liability of the plaintiff to them, to hold that the defendants would acquire a title to the proceeds of the note by a transfer of the same to a third person. A party cannot fortify his title to property by a sale, as the title to proceeds upon sale will be the same as to the property before sale. I am of the opinion that the plaintiff had an election of damages—trover for the conversion of the note, or an action for money had and received—for the amount which the defendants realized upon the sale of the note. This follows from the conceded rule that the defendants were without title to the note, or authority to dispose of the same."

In Chit. Bills, star page 251, the author says:

"Where a note or bill was void in its creation, the party entitled to the instrument may maintain an action of *detinue* or trover to recover the same or its value, or *assumpsit* for money had and received if the proceeds of the bill have been received."

And in *Lamb* v. *Clark*, 5 Pick. 193, 197, the court say:

"There are cases where an injured party may have his election of remedies; as where there has been a tortious taking of his property

he may bring trespass or trover, or he may waive both, and bring *assumpsit* for the proceeds, when it has been converted into money."

In such case the maker is regarded as the party entitled to the note as against the holder, whose transfer of the same is liable to work an injury to the former, by imposing on him a liability which could not be enforced by the payee, so as to validate that which was before unlawful or unauthorized. And there appears to be no question that, where a person has wrongfully obtained possession of the property of another, and has sold and received the money for it, the real owner may waive the tort, and bring an action for money had and received. He has his election to sue for a conversion, or he may affirm the transaction and recover of the wrong-doer for the proceeds, in which case the title to the property sold will be confirmed in the purchaser. *Solutio pretii emptionis loco habetur.* *Lamb* v. *Clark*, 5 Pick. 193; 4 Wait, Act. & Def. 472–475, and cases.

In this case, since the Plainview Company received the full face value of the bonds, the amount of the recovery, if any is had, would be the same in either form of action, and the allegations of the complaint and findings of fact are sufficient to support the action in either form. The title to the bonds has been confirmed in the present holders, and they have recovered, or will recover, the full amount thereof; and the liability of the town has been fixed through the acts of the Plainview Company in procuring and negotiating the same, which acts this court holds to have been unauthorized and wrongful. Upon what theory, then, can that corporation claim either that it should be exempted from the consequences of such acts, or that it is entitled to retain the proceeds of the bonds?

III.

No obligation of any contract has been impaired. This court has no jurisdiction on the case presented by this record, as to that question. No law subsequent to the contract has been enacted.

There was no decision of the supreme court of Minnesota, at the time when the alleged contract was made and performed, sustaining the validity of the law under which it was made.

The validity of the statute under which these bonds were issued was first brought into question in the *Harrington Case*, and that suit was brought before the bonds in suit were issued.

The decision in the *Case of the Town of Highland* was rendered January 10, 1879, and the alleged contract of the Plainview Company with the towns was made, and the railroad was completed, in 1878.

The act of March 3, 1881, by which the Plainview Company was authorized to transfer its property and franchises to the plaintiff in error, and the latter was authorized to acquire the same on condition that it should assume and be liable for any obligations of the Plainview Company to the towns on account of the transaction between those parties respecting the bonds, and the effect given to that act by the supreme court of Minnesota, do not impair the obligation of any contract.

There are two classes of cases wherein this constitutional provision has been considered by this court in determining its jurisdiction:

First. Those cases which were begun in, or removed to, and which were decided by, the federal courts of original jurisdiction.

Second. Those cases which were decided by the highest courts of the states, and which were brought to this court for review.

In the first class of cases it is the right and duty of the federal courts to "exercise their own judgment; as they always do in reference to the doctrines of commercial law and general jurisprudence," where the law has not been settled by the state courts, or where contracts have been entered into and rights have accrued under a particular state of such decisions, and a different interpretation has been adopted by the state courts after such rights have accrued.

Burgess v. *Seligman*, 107 U. S. 20, 33.

The cases in which this principle has been asserted under the first class are referred to in a note upon page 34 of the opinion in this case, and they belong without exception, we believe, to that class.

The cases of the second class, when brought before this court for review, afford a much more restricted ground of jurisdiction. Some right or privilege, under federal law or authority, must have been

claimed in and denied by the state court, *e. g.*, some authority under federal law must have been set up and decided against; some right under the fourteenth amendment must have been claimed and denied; some law passed by the state since a contract was made must have impaired that contract, and been held valid by the state court, etc.

It is contended by the plaintiff in error that the provision of the federal constitution forbidding the states to pass any law impairing the obligation of contracts has been violated in the present cases;

First. By the decision of the supreme court in the *Harrington Case*, and the effect given to it in those cases which, it is asserted, reverses a settled construction of the act of 1877, under which these bonds were issued, particularly by the *Highland Case*.

Second. By giving such an effect to the act of March 3, 1881, by which the plaintiffs in error were authorized to purchase, and the Plainview Railroad Company was authorized to sell, the property and franchises of the latter company, as impairs the contract obligations theretofore subsisting between the Plainview Company and the towns.

"When the state court decides against a right claimed under a contract, and there was no law subsequent to the contract, this court clearly has no jurisdiction."

New Orleans Water-Works Company v. *Louisiana Sugar Refining Company*, 125 U. S. 18, 35.

"It is equally clear that the law of the state to which the constitution refers in that clause must be one enacted after the making of the contract, the obligation of which is sought to be impaired."

Lehigh Water Co. v. *Easton*, 121 U. S. 391.

The decision of the supreme court of Minnesota in the *Harrington Case* cannot be held to impair, or to construe any statute so as to impair, the obligation of any contract between the towns and the Plainview Company.

There was no settled course of decision as to the statute. It had been in operation little more than a year when Harrington brought his suit. Its constitutionality was considered for the first time by the supreme court in that case.

The Plainview Company (to whose property and franchises the plaintiff in error is successor) was a party to that action, and the town of Plainview was also a party. The plaintiff in error is suc-

cessor to the liabilities of the Plainview Company to the towns, and it is such successor by the express terms of the statute, which enlarged its powers so as to enable it to acquire the property of the Plainview Company, and they are both bound by the decision in the *Harrington Case*.

The bonds were issued pending that litigation, and were sold by the Plainview Company, and Marshall and Illsley bought them of Thomas without notice of that suit. They therefore took them unaffected by the Harrington litigation.

Olcott v. *Fond du Lac County*, 16 Wall. 678.
National Bank of Washington v. *Texas*, 20 Wall. 72.
Warren County v. *Marcy*, 97 U. S. 96.
Warren County v. *Post*, 97 U. S. 110.
Orlean v. *Platt*, 99 U. S. 676.
Cass County v. *Gillett*, 100 U. S. 585.

The decision of the supreme court of Minnesota in the *Harrington Case* was urged in the circuit court in the Marshall and Illsley cases as a defense; but it was overruled on the ground that Marshall and Illsley had no notice of, and were not bound by, that suit. NELSON, J.:

"It is urged that the bonds are invalid in the plaintiffs' hands by the fact that they were purchased during the pendency of the suit in which the law was held to be unconstitutional. The answer to this proposition is that the plaintiffs were not parties to, and had no knowledge of, that suit; and the rule that all persons are bound to take notice of a pending suit does not apply to negotiable securities. 97 U. S. 96."

Marshall & Illsley v. *Plainview*, (Record.)

Plainly, in the Plainview case we have a clear right of recovery, upon that record. That decision also stands as a precedent in the Elgin case. Both towns were therefore held by the supreme court of Minnesota entitled to recover against the plaintiff in error.

The proposition that the decision in the *Harrington Case* impairs the obligation of a contract has no foundation. We cite:

R. R. Co. v. *McClure*, 10 Wall. 511.
Knox v. *Exchange Bank*, 12 Wall. 379.
Tarver v. *Keach*, 15 Wall. 67.

New Orleans Water-Works Co. v. *Louisiana Sugar Refining Co.*, 125 U. S. 18–35.

Reynolds v. *Stockton*, 140 U. S. 254.

Wright v. *Nagle*, 101 U. S. 791.

Weston v. *City of Charleston*, 2 Pet. 462.

In *R. R. Co.* v. *McClure*, the state court had enjoined the collection of taxes for the payment of certain county bonds which had been issued to railroads, holding that the bonds were void under the constitution of Iowa.

The case was removed to the supreme court of the United States, and the record showed that the creditors made the question before the state courts "that the decision of the court below violated the clause in the constitution of the United States that no state shall pass any law impairing the obligation of contracts."

It was argued for the plaintiff in error:

"That, at the time when the bonds were issued, the constitution of that state, now construed by the courts in the decision below so as not to authorize the issue by counties of railroad bonds, had been construed so as to authorize such issues; and argued that the later interpretation, adverse to the validity of the bonds, impaired the obligation of the contract."

The court says:

"The question of the validity of the bonds is not one of federal jurisdiction. The constitution of the United States declares that no state shall pass a law impairing the obligation of contracts. The constitution of a state is undoubtedly a law, within the meaning of this prohibition. * * * But the state has passed no law upon the subject; and the constitution of the state, as construed by the supreme court of the state, has worked the result complained of, and was in force when the bonds were issued. The 25th section of the judiciary act of 1789 specifies the questions of which we can take cognizance in this class of cases, and expressly excludes all others from our consideration. It is clear that the case before us is not within the affirmative category."

The court then goes on to say that, had action been brought up from the circuit court of the United States, the question could have been considered.

Or had the action been removed to the circuit court, and thence to the supreme court, the question could have been passed upon.

In the present case both the statute and the constitution of the

state existed long antecedent to the inception of any of the acts and doings upon which the contract for these bonds was predicated.

No statute or constitutional provision had intervened. The supreme court of Minnesota had construed the constitution and statutes antecedently existing in the *Harrington Case*, and has held the bonds void because in violation of the constitution. That decision is conclusive on this court in these cases, coming here, as they do, from the state court.

If it is said that the decision of the supreme court of this state was in a case in which a statute was drawn in question which was repugnant to the constitution of the United States, and that the decision was in favor of the validity of that statute, and that the supreme court of this state was acting under the authority of the state at the time its decision was rendered,—if this is said, we reply in the language of the supreme court of the United States:

"There are two answers to this ground: *First*, that the authority conferred on a court to hear and determine cases in a state is not the kind of authority referred to in the 25th section, otherwise every judgment of the supreme court of a state would be re-examinable under the section; and, *second*, the decision of the court was not repugnant to the constitution.

"It simply held that the promissory notes, together with the mortgage in question, were nullities, on the ground that the 'Confederate currency' which constituted the consideration was illegal according to the law of the state at the time the contract was entered into.

"As no federal question appears in the record, the motion to dismiss must be granted."

Bethell v. *Demaret*, 10 Wall. 540.

The utmost that the plaintiff in error can assert (and we shall show that there is no foundation for the assertion) is that the supreme court of Minnesota by its decision before the bonds were issued, recognized the law as valid; and that, after they were issued, that court declared them void by a decision based on the constitution of the state and a statute, (viz., the statute by virtue of which the bonds issued,) both in force long prior to the making of the contract.

This, were it true, is not sufficient to give this court jurisdiction to review the decision of the supreme court of Minnesota.

That this court can take no jurisdiction of these cases on this

ground is well settled by the cases of *Lehigh Water Co.* v. *Easton*, 121 U. S. 388, and *N. O. Water-Works* v. *La. Sugar Co.*, 125 U. S. 18. In the last case this court said:

"In order to come within the provision of the constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the state. The prohibition is aimed at the legislative power of the state, and not at the decisions of its courts, or the acts of the administrative or executive boards or officers, or the doings of corporations or individuals.

"This court, therefore, has no jurisdiction to review a judgment of the highest court of a state on the ground that the obligation of a contract has been impaired, unless some legislative act of the state has been upheld by the judgment sought to be reviewed. The general rule, as applied to this class of cases, has been clearly stated in two opinions of this court, delivered by Mr. Justice MILLER. 'It must be the constitution or some law of the state which impairs the obligation of the contract, or which is otherwise in conflict with the constitution of the United States; and the decision of the state court must sustain the law or constitution of the state in the matter in which the conflict is supposed to exist, or the case for this court does not arise.' *Railroad Co.* v. *Rock*, 4 Wall. 177, 181. 'We are not authorized by the judiciary act to review the judgments of the state courts because their judgments refuse to give effect to valid contracts, or because those judgments in their effect impair the obligation of contracts. If we did, every case decided in a state court could be brought here, where the party setting up a contract alleged that the court had taken a different view of its obligation to that which he held.' *Knox* v. *Exchange Bank*, 12 Wall. 379, 383.

"As later decisions have shown, it is not strictly and literally true that a law of a state, in order to come within the constitutional prohibition, must be either in the form of a statute enacted by the legislature in the ordinary course of legislation, or in the form of a constitution established by the people of the state as their fundamental law.

"In *Williams* v. *Bruffy*, 96 U. S. 176, 183, it was said by Mr. Justice FIELD, delivering judgment: 'Any enactment, from whatever source originating, to which a state gives the force of law, is a statute of the state, within the meaning of the clause cited, relating to the jurisdiction of this court,' (Rev. St. § 709;) and it was therefore held that a statute of the so-called 'Confederate States,' if enforced by one of states as its law, was within the prohibition of the constitution.

"So a by-law or ordinance of a municipal corporation may be such an exercise of the legislative power delegated by the legislature to the corporation as a political subdivision of the state, having all the force of law within the limits of the municipality, that it

may properly be considered as a law, within the meaning of this article of the constitution of the United States.

"For instance, the power of determining what persons and property shall be taxed belongs exclusively to the legislative branch of the government, and, whether exercised by the legislature itself or delegated by it to a municipal corporation, is strictly a legislative power. *United States* v. *New Orleans*, 98 U. S. 381, 392; *Meriwether* v. *Garrett*, 102 U. S. 472. Accordingly, where the city council of Charleston, upon which the legislature of South Carolina, by the city charter, had conferred the power of taxing persons and property within the city, passed ordinances assessing a tax upon bonds of the city, and thus diminishing the amount of interest which it had agreed to pay, this court held such ordinances to be laws impairing the obligation of contracts, for the reason that the city charter gave limited legislative power to the city council, and, when the ordinances were passed under the supposed authority of the legislative act, their provisions became the law of the state. *Murray* v. *Charleston*, 96 U. S. 432, 440. See, also, *Home Ins. Co.* v. *City Council of Augusta*, 93 U. S. 116.

"But the ordinance now in question involved no exercise of legislative power. The legislature, in the charter granted to the plaintiff, provided that nothing therein should 'be so construed as to prevent the city council from granting to any person or persons, contiguous to the river, the privilege of laying pipes to the river, exclusively for his or their own use.' The legislature itself thus defined the class of persons to whom, and the object for which, the permission might be granted. All that was left to the city council was the duty of determining what persons came within the definition, and how and where they might be permitted to lay pipes, for the purpose of securing their several rights to draw water from the river, without unreasonable interfering with the convenient use by the public of the lands and highways of the city. The rule was established by the legislature, and its execution only committed to the municipal authorities. The power conferred upon the city council was not legislative, but administrative, and might equally well have been vested by law in the mayor alone, or in any other officer of the city. *Railroad Co.* v. *Ellerman*, 105 U. S. 166, 172; *Day* v. *Green*, 4 Cush. 433, 438. The permission granted by the city council to the defendant company, though put in the form of an ordinance, was in effect but a license, and not a by-law of the city; still less a law of the state. If that license was within the authority vested in the city council by the law of Louisiana, it was valid; if it transcended that authority, it was illegal and void. But the question whether it was lawful or unlawful depended wholly on the law of the state, and not at all on any provision of the constitution or laws of the United States.

"The cases of *New Orleans Water-Works* v. *Rivers*, 115 U. S. 674, and *St. Tammany Water-Works* v. *New Orleans Water-Works*, 120 U.

S. 64, on which the plaintiff relied in support of its bill, were essentially different from the case at bar. In each of those cases the validity of the article of the constitution of 1879 abolishing monopolies was drawn in question by the bill, and relied on by the defendants. Rivers did not contend that his property was contiguous to the river. The St. Tammany Water-Works Company had been incorporated since the New Orleans Water-Works Company, under a general statute of the state, for the purpose of supplying the whole city and its inhabitants with water. And both those cases were appeals from the circuit court of the United States, upon which this court was not restricted to the consideration of federal questions decided below, but had jurisdiction to determine the whole case.

"The difference in the extent of the jurisdiction of this court on writ of error to the highest court of a state and on appeal from a circuit court of the United States, as affected by the ground of the decision of the court below, is illustrated by the cases of contracts payable in Confederate currency, or made in consideration of loans of Confederate currency, during the war of the Rebellion, and by the cases of promissory notes given before that war for the price of persons sold as slaves.

"In *Thorington* v. *Smith*, 8 Wall. 1, this court, reversing a judgment of the circuit court of the United States in Alabama, held that a contract for the payment of money in Confederate currency was not unlawful. Like decisions have often been made in later cases brought here from the circuit courts of the United States. *Planters' Bank* v. *Union Bank*, 16 Wall. 483, 497; *Confederate Note Case*, 19 Wall. 548; *Wilmington & Weldon Railroad* v. *King*, 91 U. S. 3; *Cook* v. *Lillo*, 103 U. S. 792. Yet in *Bethel* v. *Demaret*, 10 Wall. 537, where a suit on a mortgage to secure the payment of promissory notes given for a loan of Confederate currency had been dismissed by the supreme court of Louisiana on the ground that the notes and mortgages were nullities, because the Confederate currency, which constituted the consideration, was illegal by the general law of the state, this court dismissed the writ of error, because no statute of the state was drawn in question. And in *Bank of West Tennessee* v. *Citizens' Bank of Louisiana*, 13 Wall. 432, S. C., 14 Wall. 6, where the supreme court of Louisiana, affirming a judgment rendered by an inferior court of the state before the adoption of article 127 of the state constitution of 1868, by which all 'all agreements, the consideration of which was Confederate money, notes, or bonds, are null and void, and shall not be enforced by the courts of this state,' dismissed a suit to recover money payable in Confederate notes, basing its judgment both upon that article of the constitution and upon adjudications in that state before its adoption, this court, speaking by Mr. Justice SWAYNE, dismissed a writ of error, and said: 'The result in this case would have been necessarily the same if the constitution had not contained the provision in question. This brings the case within the authority of *Bethel* v. *Demaret*,' above cited. In

another case at the same term, the disposition by this court of the case of *Bank of West Tennessee* v. *Citizens' Bank of Louisiana* was thus explained by Mr. Justice MILLER: 'As it was apparent from the record that the judgment of the court of original jurisdiction was rendered before that article was adopted, we could not entertain jurisdiction when the decision in that particular point was placed on a ground which existed as a fact and was beyond our control, and was sufficient to support the judgment, because another reason was given which, if it had been the only one, we could review and might reverse.' *Delmas* v. *Insurance Co.*, 14 Wall. 661, 666. In *Delmas* v. *Insurance Co.*, just cited, where the judgment of the Louisiana court was put wholly upon that article of the constitution, this court therefore took jurisdiction, and reversed the judgment, but said that where a decision of the highest court of a state, 'whether holding such contract valid or void, is made upon the general principles by which courts determine whether a consideration is good or bad on principles of public policy, the decision is one we are not authorized to review.' And in *Tarver* v. *Keach*, 15 Wall. 67, as well as in *Dugger* v. *Bocock*, 104 U. S. 596, 601, the proposition thus stated was affirmed, and was acted on by dismissing a writ of error to a state court. So in *Stevenson* v. *Williams*, 19 Wall. 572, where a judgment of the supreme court of Louisiana, annulling a judgment of a lower court, on the ground that the promissory notes on which it was rendered had been given for a loan of Confederate money, was brought here by writ of error, this court, speaking by Mr. Justice FIELD, after disposing of a distinct federal question, and observing that the aforesaid ground would not be deemed in a federal court sufficient to set aside the judgment, said: 'But the ruling of the state court in these particulars, however erroneous, is not subject to review by us. It presents no federal question for our examination. It conflicts with no part of the constitution, laws, or treaties of the United States. Had the state court refused to uphold the judgment because of the provision in the constitution of the state, subsequently adopted, prohibiting the enforcement of contracts founded upon Confederate money, a federal question would have been presented. That provision, however, does not appear to have caused the ruling. 19 Wall. 576, 577.' Those cases clearly establish that, on a writ of error to a state court, this court had jurisdiction to review and reverse the judgment, if that judgment was based wholly upon the state constitution; but that, if it was based on the previous law of the state, this court had no jurisdiction to review it, although the view taken by the state court was adverse to the view taken by this court in earlier and later cases coming up from a circuit court of the United States.

"In actions brought upon promissory notes given for the purchase of slaves before the war, the same distinction has been maintained. The constitutions adopted in 1868 by the states of Arkansas, Georgia, and Louisiana, respectively, provided that the courts of the state

should not enforce any contract for the purchase or sale of slaves. In *Osborn* v. *Nicholson*, 13 Wall. 654, a judgment rendered for the defendant by the circuit court of the United States for the district of Arkansas, in an action on a promissory note for the purchase of a slave, was reversed, because this court was of opinion that the contract was valid at the time when it was made, and therefore its obligation was impaired by the subsequent constitution. For like reasons this court, in *White* v. *Hart*, 13 Wall. 646, reversed a similar judgment rendered by the supreme court of the state of Georgia, and based upon the provision of its constitution. But in *Palmer* v. *Marston*, 14 Wall. 10, where the supreme court of Louisiana, in a similar action, had placed its judgment for the defendant upon the law of the state, as established and acted upon before the adoption of the constitution of 1869, and since adhered to, and had declined to pass upon the question whether the provision of that constitution was valid or invalid as an act of legislation, and in relation to the article of the constitution of the United States against impairing the obligation of contracts, because it was unnecessary, and could have no practical influence upon the result, this court dismissed a writ of error for want of jurisdiction, saying: 'It thus appears that the provision of the state constitution upon the subject of slave contracts was in no wise drawn in question. The decision was governed by the settled principles of the jurisprudence of the state. In such cases this court has no power of review.' 'Substantially the same question arose in *Bank of West Tennessee* v. *Citizens' Bank of Louisiana*, heretofore decided. The writ of error was dismissed for want of jurisdiction. The same disposition must be made in this case.'

"These cases are quite in harmony with the line of cases, beginning before these were decided, in which, on a writ of error upon a judgment of the highest court of the state, giving effect to a statute of the state, drawn in question as affecting the obligation of a previous contract, this court, exercising its paramount authority of determining whether the statute upheld by the state court did impair the obligation of the previous contract, is not concluded by the opinion of the state court as to the validity or the construction of that contract, even if contained in a statute of the state, but determines for itself what that contract was. Leading cases of that class are *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116, in which the state court affirmed the validity of a statute authorizing a railway viaduct to be built across a river, which was drawn in question as impairing the obligation of a contract, previously made by the state with the proprietors of a bridge, that no other bridge should be built across the river; and cases in which the state court affirmed the validity of a statute imposing taxes upon a corporation, and drawn in question as impairing the obligation of a contract in a previous statute exempting it from such taxation. *State Bank* v. *Knoop*, 16 How. 369; *Ohio Life Ins. & Trust Co.* v. *Debolt*, 16 How. 416; *Mechanics' & Traders' Bank* v. *Debolt*, 18 How. 380; *Jefferson Branch Bank* v.

Skelly, 1 Black, 436; *New Jersey* v. *Yard*, 95 U. S. 104; *Memphis & Charleston Railroad* v. *Gaines*, 97 U. S. 697, 709; *University* v. *People*, 99 U. S. 309; *Louisville & Nashville Railroad* v. *Palmes*, 109 U. S. 244; *Memphis Gas Co.* v. *Shelby County*, 109 U. S. 398; *Vicksburg, etc., Railroad* v. *Dennis*, 116 U. S. 665. In each of those cases, the state court upheld a right claimed under the later statute, and could not have made the decision that it did without upholding that right, and thus gave effect to the law of the state drawn in question as impairing the obligation of a contract.

"The distinction between the two classes of cases,—those in which the state court has, and those in which it has not, given effect to the statute drawn in question as impairing the obligation of a contract, —as affecting the consideration by this court, on writ of error, of the true construction and effect of the previous contract, is clearly brought out in *Kennebec Railroad* v. *Portland Railroad*, 14 Wall. 23. That was a writ of error to the supreme judicial court of Maine, in which a foreclosure, under a statute of 1857, of a railroad mortgage made in 1852, was contested upon the ground that it impaired the obligation of the contract, and the parties agreed that the opinion of that court should be considered as part of the record. Mr. Justice MILLER, in delivering judgment, after stating that it did appear that the question whether the statute of 1857 impaired the obligation of the mortgage contract 'was discussed in the opinion of the court, and that the court was of the opinion that the statute did not impair the obligation of the contract,' said: 'If this were all of the case, we should undoubtedly be bound in this court to inquire whether the act of 1857 did, as construed by that court, impair the obligation of the contract. *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116. But a full examination of the opinion of the court shows that its judgment was based upon the ground that the foreclosure was valid, without reference to the statute of 1857, because the method pursued was in strict conformity to the mode of foreclosure authorized, when the contract was made, by the laws then in existence. Now, if the state court was right in their view of the law as it stood when the contract was made, it is obvious that the mere fact that a new law was made does not impair the obligation of the contract. And it is also clear that we cannot inquire whether the supreme court of Maine was right in that opinion. Here is, therefore, a clear case of a sufficient ground on which the validity of the decree of the state court could rest, even if it had been in error as to the effect of the act of 1857 in impairing the obligation of the contract; and, when there is such distinct and sufficient ground for the support of the judgment of the state court, we cannot take jurisdiction, because we could not reverse the case, though the federal question was decided erroneously in the court below against the plaintiff in error. *Rector* v. *Ashley*, 6 Wall. 142; *Klinger* v. *Missouri*, 13 Wall. 257; *Steines* v. *Franklin County*, 14 Wall. 15. The writ of error must therefore be dismissed for want of jurisdiction.' 14 Wall. 25, 26.

"The result of the authorities, applying to cases of contracts the settled rules that, in order to give this court jurisdiction of a writ of error to a state court, a federal question must have been, expressly or in effect, decided by that court, and, therefore, that when the record shows that a federal question and another question were presented to that court, and its decision turned on the other question only, this court has no jurisdiction, may be summed up as follows: When the state court decides against a right claimed under a contract, and there was no law subsequent to the contract, this court clearly has no jurisdiction. When the existence and the construction of a contract are undisputed, and the state court upholds a subsequent law on the ground that it did not impair the obligation of the admitted contract, it is equally clear that this court has jurisdiction. When the state court holds that there was a contract conferring certain rights, and that a subsequent law did not impair those rights, this court has jurisdiction to consider the true construction of the supposed contract, and, if it is of opinion that it did not confer the rights affirmed by the state court, and, therefore, its obligation was not impaired by the subsequent law, may on that ground affirm the judgment. So, when the state court upholds the subsequent law on the ground that the contract did not confer the right claimed, this court may inquire whether the supposed contract did give the right, because, if it did, the subsequent law cannot be upheld. But when the state court gives no effect to the subsequent law, but decides, on grounds independent of that law, that the right claimed was not conferred by by the contract, the case stands just as if the subsequent law had not been passed, and this court has no jurisdiction."

The cases cited by the plaintiff in error, such as *Anderson* v. *Santa Anna*, 116 U. S. 56; *Douglas County* v. *Pike*, 101 U. S. 677; *Taylor* v. *Ypsilanti*, 105 U. S. 60; and the whole line of similar cases running back to *Gelpcke* v. *Dubuque*, 1 Wall. 175,—came before this court from the circuit courts of the United States, and are disposed of, so far as their applicability to the cases at bar are concerned, by the opinion of this court above quoted.

The *Case of the Town of Highland* is reported 25 Minn. 355. The facts, as stated in the report, are that on March 16, 1878, the railroad company delivered to the town-clerk its proposition requesting aid in bonds in the sum of $5,000. The bonds were to be delivered when the company should have constructed its railway, with the cars running thereon, from the city of Wabasha through the town of West Albany to the south line of section 34 in said town. This condition precedent was to be performed by May 1, 1878.

On May 13, 1878, and *after* it had constructed the road, the rail-

way company delivered to the clerk of the town a copy of the proposition, with a petition of a majority of the tax-payers appended, asking the board of supervisors to agree to the petition. The railroad company began and prosecuted the construction of its road from the city of Wabasha, and on May 1, 1878, (prior to the date when it filed the petition of the tax-payers,) had completed it to the point named in the proposition. The town refused to issue the bonds.

On January 31, 1878, the Plainview Company delivered to the town-clerk of that town a proposition in writing. On January 22, 1878, the Plainview Company delivered to the town-clerk of the town of Elgin its proposition in writing.

On March 30, 1878, the railway company delivered to the town-clerk of Plainview four petitions of the tax-payers. On March 28, 1878, such a petition was delivered to the town-clerk of the town of Elgin. On March 30, 1878, the board of supervisors of the town of Plainview adopted a resolution accepting the proposition. On March 30, 1878, the board of supervisors of Elgin adopted a resolution accepting the proposition.

The road was completed about November 1, 1878. On March 18, 1879, pending the *Harrington Case*, the board of supervisors of Plainview passed a resolution directing the town officers to issue the bonds. On November 16, 1878, the board of supervisors of the town of Elgin passed a similar resolution. The bonds of the town of Elgin were issued on the 16th day of November, 1878, and the bonds of the town of Plainview on the 19th day of March, 1879. After passing through the hands of various holders, they came into the hands of Marshall and Illsley in the month of July, 1879.

Now, the *Highland Case* was decided January 10, 1879, (25 Minn. 355.)

The foregoing summary of dates shows that the alleged contract between the towns and the Plainview Company was made and executed by the completion of the road in 1878, before the *Highland Case* was decided. At the time the Plainview Company received the bonds and built the road, the *Highland Case* had not been decided. Marshall and Illsley might have relied on this decision, but clearly the Plainview road could not.

So far as the rights of the towns against the Plainview Company and its successors in liability, the plaintiffs in error, are concerned,

the foregoing considerations, we submit, dispose of any argument that any contract, as between those parties, has been impaired.

It does not appear from the report of the *Case of the Town of Highland*, 23 Minn. p. 355, that any question was made as to the constitutionality of any part of the act of 1877. It was not necessary for the court to consider or decide that question. The decision was based upon the fact that the road to be aided, or the portion of the road to be aided, was completed before any agreement had been arrived at or perfected.

See statement of facts in that case, *ante*.

The court say, (page 361:)

"Now, it appears from the writ that the length of road thus proposed to be constructed and equipped was completely constructed and equipped on May 1, 1878, as provided in the relator's proposition, but that the filing with the town-clerk of the petition and other papers was not made until May 13, 1878; so that no agreement had been arrived at or perfected before that date. At that date the length of road, aid in the construction of which was asked, had already been constructed, and therefore, we have before seen, it was not a road or piece of road, to aid the construction of which the town was authorized by the statute to issue, or to agree to issue, its bonds. The authority of a town to issue bonds in aid of the construction of a railroad, being wholly derived from statute, can only be exercised in the cases and in the manner which the statute permits and provides. Upon the facts stated in the writ, it therefor follows that the respondent has made no legal agreement to issue its bonds to the relator, and the motion to quash the writ is accordingly granted."

The courts will not pass upon the constitutionality of a statute unless such consideration is necessary to determine the case. The facts in the *Highland Case* made the bonds void, even if they had been authorized by an election.

The supreme court of Minnesota has never at any time affirmed the constitutionality of this statute, or of any law like it.

Gilder v. *Town of Otsego*, 20 Minn. 74, arose upon a statute providing for the construction of a bridge, (part of a highway,) and for the contributory expense thereof in certain proportions as between certain towns. Bridge commissioners named in the act were required to contruct the bridge, and certain provisions were made as to the manner in which the same should be paid for. The court held that this was valid legislation. It is to be noted that the only attack in that

case upon the validity of this legislation, upon any constitutional ground, was that it infringed upon certain constitutional provisions respecting equality of taxation, and the powers of local taxation of county and township organizations, which the constitution provides may be as prescribed by law. *Gilder* v. *Town of Dayton*, 22 Minn. 366, was a case upon the same statute against the other contributing town upon the same obligation, and the court followed its previous decison in the *Otsego Case*.

In *Davidson* v. *County Commissioners of Ramsey County*, 18 Minn. 482, the city of St. Paul, under legislative authority, had issued $200,000 of its bonds to a certain railroad company. The court upheld the validity of the law authorizing the city to execute its bonds, and there is no question in that case at all analogous to those presented in the cases at bar.

On the contrary, in *Sanborn* v. *Commissioners of Rice Co.*, 9 Minn. 273, the supreme court of Minnesota enunciated certain constitutional principles which place that court in a line of logical sequence directly leading to its decision in the *Harrington Case*.

In the *Sanborn Case* the supreme court of Minnesota held a law to be unconstitutional by which the board of county commissioners were required to audit the claim of Sanborn and others against a certain school-district, and which also provided that, to pay the amount of the audit, the board should vote a tax upon the property of the district.

It will doubtless be contended that the act of March 3, 1881, and the effect given to it by the supreme court of Minnesota, impair the obligation of the alleged contract between the town and the Plainview Company. This is the act by which the Plainview Railway Company was permitted to sell to the Winona & St. Peter Railroad Company, and the latter was empowered to buy, all of the property and franchises of the former company, "provided that such purchase of the property and franchises of the Plainview Railway Company shall be made and all such property held by said Winona & St. Peter Railroad Company subject to all demands, claims, and rights of action against or growing out of the latter company having heretofore obtained and disposed of certain bonds and coupons purporting to have been issued by the towns of Plainview, Elgin, and Viola to said Plainview Company; and in taking such transfer under this act said purchas-

ing company shall assume all claims and demands against said Plainview Railway Company to the extent and order only of the property and franchises so transferred."

To this contention of the plaintiff in error there are several answers, in addition to the general considerations elsewhere presented.

First. Both companies are Minnesota corporations. Both wished authority to make this transfer, and obtained from the legislature new and enlarged powers for that purpose. The legislature granted that authority on the above conditions. The companies accepted and exercised the powers conferred by the statute. They did so *cum onere*. No new contract is made. The plaintiff in error becomes liable, if the Plainview Company was liable, upon the same antecedent facts and transactions; and it became liable by its own consent, in accepting the statute, exercising the powers it conferred, and receiving its benefits. The plaintiff in error cannot now repudiate the condition. No contract is violated. A new and additional party is made liable to a former liability by the consent of that party, the plaintiff in error. The condition would be valid, even if it were destructive of the contract, and imposed an entirely new and enlarged obligation, because, by performing the act which the statute permits, the companies accepted the condition which imposed such obligation, and waived their former contract-rights (if they had any) to the extent prescribed by the condition.

Second. The plaintiff in error would be liable to the towns to the same extent, even if the statute of March 3, 1881, had never been enacted.

It is a well-settled principle of law that where one corporation goes entirely out of existence by being merged in or annexed to another corporation, if no arrangements are made respecting the property and liabilities of the corporation that ceases to exist, the subsisting corporation will be entitled to all the property, and be answerable for all the liabilities. When the benefits are taken, the burden is assumed.

Thompson v. *Abbott*, 61 Mo. 176.
Mount Pleasant v. *Beckwith*, 100 U. S. 533.
Society of Philadelphia, 31 Pa. St. 175–185.
Rorer on Railroads, page 38.
Railway Co. v. *Branch, Sons & Co.*, 59 Ala. 139.

S. C., 6 Am. Corp. Cases, 36.
Tysen v. *Wabash Railway*, 15 Fed. Rep. 763.
Railway Co. v. *Railway Co.*, 58 Miss. 846.
S. C., 8 Am. Corp. Cases, 76.
Railway v. *Skidmore*, 69 Ill. 568.
Railway v. *Smith*, 75 Ill. 496.
Railway v. *Moffit*, 75 Ill. 524.
Whipple v. *U. P. Railway*, 28 Kan. 474.
Railway v. *Fry*, 56 Texas, 609.
Warren v. *Railway*, 49 Ala. 582.
Railway v. *Powell, Adm.*, 40 Ind. 37.

The writs should be dismissed, or the judgments affirmed.

C. K. DAVIS,
FRANK B. KELLOGG,
Counsel for Defendants in Error.

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CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 171.
No. 172.

The Winona & St. Peter R.R. Co.
PLAINTIFF IN ERROR.

v.

The Town of Plainview,
DEFENDANT IN ERROR.

The Winona & St. Peter R.R. Co.
PLAINTIFF IN ERROR.

v.

The Town of Elgin,
DEFENDANT IN ERROR.

C. K. DAVIS,
FRANK B. KELLOGG,
of Counsel for Defendants in Error.

SUPPLEMENTAL BRIEF.

Supreme Court of the United States.

OCTOBER TERM, 1891.

THE WINONA & ST. PETER RAILROAD COMPANY, PLAINTIFF IN ERROR,
v.
THE TOWN OF PLAINVIEW,
DEFENDANT IN ERROR.

THE WINONA & ST. PETER RAILROAD COMPANY, PLAINTIFF IN ERROR,
v.
THE TOWN OF ELGIN,
DEFENDANT IN ERROR.

We have but recently received the brief of the plaintiff in error, and desire to submit some considerations relative thereto.

I.

The record shows that the contention that the act of March 3, 1881, impairs the obligation of a contract, appears for the first time in this Court. It does not appear that its validity was drawn in question in the State court. It does not appear that any such proposition was set up, asserted, or considered in the State court.

The case is much the same with that presented in Butler *v.* Gage (138 U. S. p. 52). In that case the supreme court of Colorado had rendered final judgment. The plaintiff in error moved for leave to reargue orally. The motion was denied. Whereupon he presented a petition for a writ of error, stating that the refusal of the court to grant this motion "drew in question the constitutionality of the statutes of the State of Colorado," describing them by their title and date of approval.

This Court observes (*Id.* p. 60): "Yet we are asked to retain this cause for the purpose of deciding that question, notwithstanding the plaintiffs in error acquiesced in the hearing of the case by the commission, and stipulated as to the time when the argument should take place before that body; participated in that argument; petitioned the supreme court for a rehearing, and did not moot the point now raised until after the final judgment of the supreme court had been pronounced and the petition for rehearing had been overruled. The validity of a statute of or an authority exercised under the State of Colorado, on the ground of such statute or authority being repugnant to Constitution, treaties, or laws of the United States, was not drawn in question in the supreme court of Colorado, and that court did not decide in favor of its validity. No title, right, privilege, or immunity, or any treaty or statute of, or commission held, or authority exercised under the United States, was specially set up or claimed under such Constitution, treaty, statute, commission, or authority, and no decision was rendered against such right, title, privilege, or immunity. The supreme court of the State confessedly went to judgment without any suggestion that a Federal question was presented for its determination, and not even in the petition for rehearing was any such question brought to the attention of the court. And the disposi-

tion of the motion that oral argument be permitted after the petition for rehearing was denied did not in itself necessarily involve the decision of a Federal question.

"We cannot, under such circumstances, re-examine the judgment and orders of that court, and the writ of error must be dismissed."

We also maintain that there is no assignment of error which raises the question, insisting here, as in our other brief, that there are no sufficient assignments of error in this record upon any point.

The case of Harrington *v.* The Town of Plainview (27 Minn. 224), appears by the report to have been decided October 6, 1880. That action involved the validity of these identical bonds. There was no Federal question whatever in the case. The decision was a construction of the Constitution as it existed before the legislation there in question was passed. It will appear by an examination of the report that the counsel endeavored to sustain the validity of the bonds by precisely the same argument and upon the same authorities by which it is attempted to have this Court reconsider the same question.

The supreme court of Minnesota held in that case that under the constitution of that State there was only one method in which the towns could determine "what action requiring local taxation it will take in a particular case," namely, through the electors; that any action requiring local taxation to be taken by the towns based upon a petition of tax-payers was void, and that any bonds issued thereunder were invalid as between the town and the railroad company. And it distinguished the provisions of the constitution of Minesota from those of Vermont and New York in this respect. (27 Minn. p. 233, opinion.)

The supreme court of Minnesota had held the bonds invalid on "grounds independent of" the act of 1881. In

the cases at bar it followed its decision that these bonds were invalid made in the Harrington case, the year before the act of March 3, 1881, was passed. It gave, and could give, to that act no effect upon the question of the validity of the bonds, because the statute has not the remotest bearing on that question, thus bringing the case within the following principle: "But when the State court gives no effect to the subsequent law, but decides on grounds independent of that law that the right claimed was not conferred by the contract, the case stands just as if the subsequent law had not been passed, and this Court has no jurisdiction."

N. O. Waterworks *v.* La. Sugar Co., 125 U. S. pp. 38–39, Opinion.

Before the act of 1881 was passed, the question of the validity of these bonds had been decided by the supreme court of Minnesota, as between the towns and the Plainview Company. Marshall and Illsley, the *bona fide* holders, obtained the bonds in 1879. The towns could then have sustained an action against that Company for the tortious transfer of the bonds, which had the effect of making the towns liable to the *bona fide* holders. This was a complete and perfect right of action upon a complete and perfect liability, before the act of 1881 was passed. That act did not affect that right of action nor that liability, and it is that liability which the plaintiff in error sought authority to assume and did assume by proceeding under the act of 1881, and exercising the enlarged corporate powers granted by that act. The whole fallacy of the argument on behalf of the plaintiff in error consists in suppressing the fact that this statute, instead of imposing or being the cause of the liability, simply allowed the plaintiff in error to do what it could not do before, namely, to contract to assume this very liability which it now seeks to repudiate.

Even if a statute does impair the obligation of a contract, yet the parties to such contract can lawfully agree that the subsequent statute shall be obligatory upon them, and such agreement will be enforced, especially when the parties have performed it and retain the results and proceeds of performance.

We repeat that the act of 1881 does not affect the contract. By its very terms it leaves it precisely where it was before. It leaves it decided and construed by the supreme court of Minnesota under the law as it was at the time the contract was entered into and performed, and the liability under it (if any) incurred. The statute merely declares that if the Plainview Company was liable to the town "for having heretofore *received and disposed of*" these very bonds, the Winona Company must, if it exercised the granted and enlarged powers to purchase, assume that existing liability, whatever it was, and the Winona Company so stipulated. It desired an enlargement of its corporate powers. This the legislature granted, and the Company accepted upon the express condition that it should be liable if the Plainview Company was liable.

By purchasing under this statute so conditioned, the Winona Company placed itself in the position of the Plainview Company, and no one can contend that the Plainview Company can raise any question under the act of 1881. This is plain, for the reason that the right of action by the towns against the Plainview Company is perfect and complete without the assistance of that act, and existed before its passage. To sustain the contention of the plaintiff in error is to violate the contract which the Winona Company has made.

This statute is very different from statutes which do not require contractive action or assent by those who are to be affected by them.

This is a statute which permitted the Winona Company to assent to and contract to do what it could not before assent to or contract to do, and in consequence of which it did assume certain pre-existent obligations. Therefore the snpreme court of Minnesota did not "uphold the subsequent law on the ground that the contract did not confer the right claimed." It upheld it on the ground that the Winona Company had contracted, as part of the price it was to pay for the property and franchises which it bought, by and through the permission of this statute, to become liable to the same extent that the Plainview Company was liable. And as we have observed, the liability of the Plainview Company is not in the remotest degree affected by the act of 1881.

To state our position in another form. The contract had been declared void as between the Plainview Company and the towns. That Company had made these bonds (which were invalid in its hands) valid in the hands of *bona fide* holders by transferring them. All this was before the passage of the act of 1881. Thereupon a right of action arose in favor of the towns and against the Plainview Company, and still exists. But after all this came to pass, the Winona Company wished to purchase all the property and franchises of the Plainview Company. Such purchase would render fruitless any judgment in favor of the towns against the Plainview Company. Legislative authority to make this sale and purchase was necessary for both companies. For these reasons the statute provided "that any such purchase of the property *or* franchises" should subject the purchasing company to the right of action of the towns against the Plainview Company, and that the purchasing company, the plaintiff in error, should "assume" these "claims and demands."

Now what were these claims and demands to which

such purchase subjected the Winona Company, and which it by such purchase assumed? They were, in the language of the act of 1881, "all demands, claims and rights of action against said Plainview Railroad Company, arising or growing out of the latter Company having heretofore obtained *and disposed of*" these bonds.

If the Plainview Company is liable to the town, the Winona Company is so liable, and the supreme court of Minnesota having decided, before the act of 1881 was passed, that the bonds were void, there was no Federal question involved in that decision; so that the only question left was whether the Plainview Company, having disposed of the identical bonds which the supreme court of Minnesota had thus declared void as between it and the towns to *bona fide* purchasers who had enforced them, had created a cause of action in favor of the towns. Suppose this suit was between the towns and the Plainview Company, could it be maintained that any Federal question was presented?

The object of the provision of the Constitution of the United States was to forbid the States from impairing the obligation of contracts by legislative enactments; and this Court has jurisdiction only when the State court has given effect to some legislative enactment which impairs the obligation of a prior contract.

The error of counsel is in assuming that the act of 1881 impaired the obligation of any contract or had any reference whatever to the validity of that contract. In all the cases cited by counsel on pages 22 and 23 of his brief, commencing with the case of Bridge Proprietors *v.* Hoboken Co. (1 Wall.) and ending with the case of the Yazoo & Mississippi Valley R.R. Co. *v.* Thomas (132 U. S. 174), there was a subsequent enactment impairing the obligation of a contract. For instance, in Yazoo & Mississippi Val-

ley R.R. Co. *v.* Thomas, the railroad company claimed an exemption from taxation by its charter. If this was so, then it was a contract between the State and the railroad company. The Legislature in 1888 passed an act, general in its terms, to provide for the assessment of past due and unpaid taxes on railroads which had escaped the payment thereof. The supreme court of the State gave effect to this law, and held valid an assessment of the property of the Yazoo Railroad Company for unpaid taxes, holding, however, that under the company's charter it was not exempt from taxation, and the Supreme Court of the United States held that where there was a subsequent statute which, given effect by the State court, would impair the obligation of a contract, then this Court would take jurisdiction and would determine whether the particular charter created a contract which was impaired by the act of 1888.

Looking at the enactment of the legislature of Minnesota of 1881, it is perfectly evident that it did not in any manner whatever render invalid, or attempt to render invalid, any contract between the towns of Plainview and Elgin and the Plainview Railroad Company. The Winona & St. Peter Railroad Company was not a party to any contract with the towns of Plainview and Elgin. The act of 1881 simply in effect provides that if the Plainview Railroad Company could be held to be liable for receiving and disposing of the bonds, then the Winona & St. Peter Company should assume those claims and demands against the Plainview Company to the extent and value only of the property and franchises so transferred; but if it should be held that the Plainview Company was not liable for receiving and disposing of the bonds, then the Winona & St. Peter Company assumed nothing; in other words, as a condition to the grant of the power to purchase the prop-

erty and franchises of the Plainview Company, and as a part of the consideration for the purchase, it assumed these particular liabilities and claims against the Plainview Company to the extent and value of the property so purchased.

But, says the counsel, "in the case at bar, the State court gave the Minnesota act of March 12, 1881, the actual effect of making plaintiff in error liable to the defendants in error because it held the contracts of the towns invalid." The fact that the defendant was held liable by virtue of the act of 1881 does not raise a Federal question. It was a liability voluntarily assumed by the defendant. The question is, Did the enactment of 1881 impair the obligation of a contract? Not, did it make the defendant liable? Clearly it did not.

The counsel says on page 17 of his brief, "also, even if the bonds were invalid and the Plainview Railroad Company liable for their transfer, yet this plaintiff in error was not subject to that liability except under the statute of 1881."

Herein the counsel admits that the act of 1881 did not impair the obligation of a contract, for if the bonds were invalid in the hands of the Plainview Railroad Company, and it was liable, then this act did not affect the pretended contract that the plaintiff in error claims existed between the town of Plainview and the Plainview Railroad Company. For he says on pages 16 and 17 of his brief, "this act, it must be remembered, did not purport to make the plaintiff in error liable to the towns unless the Plainview Railroad Company would have been." Certainly not; hence we say the act itself could not be given and was not given any effect that would impair any contract existing between the towns of Plainview and Elgin and the Plainview Railroad Company; for the Plainview Railroad Com-

pany must first be held liable before this enactment would have any effect whatever. In other words, the pretended contract between the towns of Plainview and Elgin must be held void before this act could take effect; hence the enactment did not inpair the obligation of the contract or make it void. His own argument is a conclusive refutation of the position he takes.

The supreme court of Minnesota held these bonds invalid by reason of constitutional provisions in force at the time of the passage of the statute under which the bonds were contracted for and issued. It did not hold them invalid by the reason of the act of 1881. The case is thus within the principle of

Bethell *v.* Demarest, 10 Wall. 537.
Bank of West Tennessee *v.* Citizens' Bank, 13 Wall. 432, S. C. 14 Wall. 6.
Delmas *v.* Ins. Co., 14 Wall. 661, 666.
Tarver *v.* Keach, 15 Wall. 67.
Stevenson *v.* Williams, 19 Wall. 572.

Concerning these cases this Court observes (N. O. Waterworks Co. *v.* La. Sugar Co., p. 35): "Those cases clearly establish that on a writ of error to a State court, this Court had jurisdiction to review and reverse the judgment, if that judgment was based wholly upon the State constitution; but that, if it was based on the previous law of the State, this Court has no jurisdiction to review it, although the view taken by the State court was adverse to the view taken by this Court in earlier and later cases coming up from a circuit court of the United States."

This Court further remarks (p. 37):

"The distinction between the two classes of cases, those in which the State court has and those in which it has not given effect to the statute drawn in question as im-

pairing the obligation of the contract, as affecting the consideration of this Court on writ of error of the true construction and effect of the previous contract, is clearly brought out in *Kennebec R.R.* v. *Portland R.R.* (14 Wall. 23). That was a writ of error to the supreme judicial court of Maine, in which a foreclosure under a statute of 1857 of a railroad mortgage made in 1852 was contested upon the ground that it impaired the obligation of the contract, and the parties agreed that the opinion of that court should be considered as a part of the record. Mr. Justice Miller, in delivering judgment, after stating that it did appear that the question whether the statutes of 1857 impaired the obligation of the mortgage contract 'was discussed in the opinion of the Court, and that the Court was of the opinion that the statute did not impair the obligation of the contract,' said: 'If this were all of the case we should undoubtedly be bound in this Court to inquire whether the act of 1857 did, as construed by that court, impair the obligation of the contract. (*Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116). But a full examination of the opinion of the Court shows that its judgment was based upon the ground that the foreclosure was valid without reference to the statute of 1857, because the method pursued was in strict conformity to the mode of foreclosure authorized when the contract was made by the laws then in existence.

"Now, if the State court was right in their view of the law as it stood when the contract was made, it is obvious that the mere fact that a new law was made does not impair the obligation of the contract. And it is also clear that we cannot inquire whether the supreme court of Maine was right in that opinion. Here is, therefore, a clear case of sufficient ground on which the validity of the decree of the State court could rest, even if it had been in error as to the effect of the act of 1857 in impairing the obligation of the contract. And when there is such distinct and sufficient ground for the support of the judgment of the State court we cannot take jurisdiction, because we could not reverse the case, though the Federal question was decided erroneously in the court below against the plaintiff in error."

In regard to the proposition of the plaintiff in error, that the purchase of all property and franchises of one corporation by another corporation does not make the purchaser responsible for the selling company's debts, that proposition has no bearing here, because it is provided in the statute of 1881, that "any such purchase of the property *or* franchises of the Plainview Company shall be made, and all such property held by said Winona & St. Peter Railroad Company, subject to all demands, claims, and rights of action against said Plainview Railroad Company arising or growing out of the latter company's having heretofore obtained and disposed of" these bonds.

"And in taking such transfer under this act, said purchasing Company shall assume all claims and demands against said Plainview Company to the extent and value only of the property and franchises so transferred."

The trial court found as a fact as follows:

"Which act, after its passage, was duly accepted and consented to by the Winona & St. Peter Railroad Company."

It was further found by the court and it was stipulated by the parties as follows: "No issue shall be raised as to the value of the property and franchises of the Plainview Railroad Company so transferred to the Winona & St. Peter Railroad Company, but if the plaintiff in this suit recovers a judgment against the defendant, no question shall be made by the defendant, but that the property conveyed and deeded to the defendant by the said Plainview Railroad Company was, and is, equal in value to the judgment so obtained," and the court further found the value to be $225,000. (Plainview Record, 133; Elgin Record.)

The court further found that the transfer was made under and by virtue of said act, and that the Winona & St. Peter Railroad Company "particularly assumed and became liable for all claims, demands, or rights of action set forth in the complaint in this action and agreed to pay the same." (Plainview Record, 135; Elgin Record.)

The supreme court of Minnesota held that this act authorized the plaintiff in error to make the purchase. (Plainview Record, 163.)

Counsel says that the plaintiff in error did not purchase the franchise to be a corporation. We simply cite the Court to the deed found on page 134, Plainview Record, where the franchises sold are described as follows:

"With all and singular the franchises, including the franchise to be a corporation."

This deed recites that it was made under and by virtue of the act of 1881.

The liability of the Plainview Company to these towns is founded on tort, and does not arise out of any contract relations whatever. It was liability for the tortious acts of the Plainview Company that the Winona Company assumed; hence there is no question of the impairment of the obligation of any contract.

II.

As to the question concerning the effect given to the judgments in favor of Marshall and Illsley, we have only to observe here respecting Factors' & Traders' Insurance Co. *v.* Murphy & Another (111 U. S. page 738). In that case both litigants claimed under a decree of sale in bankruptcy. Mrs. Murphy sought to enfore it in part as against everybody except herself. Those proceedings, as

to the property, were *quasi in rem*. The property was in possession of the court, and the title was in the assignee. The question was as to the effect of the order of sale of the particular property.

It was a proceeding based directly upon the decree, and the question was as "to the effect to be given to the sale under the order of the District Court of the United States to sell the mortgaged property free from encumbrances."

The Insurance Company claimed that all liens, including Mrs. Murphy's, had been extinguished by the decree and the purchase thereunder. Mrs. Murphy claimed that all liens excepting hers had been thus cleared and extinguished.

The Court say:

"Both parties assert rights under this order and sale. Plaintiffs in error assert that the sale as made was valid, and being sold free from encumbrances, extinguished Mrs. Murphy's lien as well as others. Defendant asserts that it had the effect of discharging all other liens but hers, and thus gave her the exclusive, paramount lien on all the property so sold. Both the parties, therefore, rely upon rights under Federal authority, and as the right of plaintiff in error was denied by the Court, the writ of error lies."

The State court held with Mrs. Murphy. This court held that as Mrs. Murphy was not a party to those proceedings, she was not bound by them. After so holding, the court proceeds:

"The effect of this proposition is that after the sale was made she was at liberty to accept such a part of the sum for which the property sold as her two notes would entitle her to in their relation to all other liens on it, by which she would have ratified the sale; or to proceed in her own way to subject the property to payment of her

debt, which she has done by the foreclosure suit now on review.

"But in this suit she has not elected to proceed in disregard of that sale, whereby, when the property would be sold under her decree of foreclosure, the proceeds of it must be brought into court and distributed among the lien holders according to their priority, but she seeks to affirm that sale as free from all encumbrances except her own, thereby assuming the benefit of a decree to which she was not a party while denying its obligation on herself, without which the decree would not have been made."

This Court held that Mrs. Murphy could not elect to take the advantage of that decree so far as it benefited her, and reject those portions which imposed a burden upon her claim, and said:

"The result of these views is, that while Mrs. Murphy is not precluded by the judicial sale, under the order of the bankruptcy court, from foreclosing the mortgages for her notes, neither are the parties who took part in that proceeding barred of the right to set up their lien, as they existed before that sale, and share in the proceeds of the new sale accordingly, and, so far as the expenditures of the Insurance Company, in payment of taxes and prior liens and improvements necessary to the prevention of loss and deterioration in the property, were required for the benefit of all lien holders, it is to be first paid out of the proceeds of the sale, and plaintiff in error should account for rents and profits, if there were any."

C. K. DAVIS,
FRANK B. KELLOGG,
Counsel for Defendants in Error.

Supreme Court of the United States.

OCTOBER TERM, 1891.

THE WINONA & SAINT PETER RAILROAD COMPANY, *Plaintiff in Error,* *vs.* THE TOWN OF PLAINVIEW, *Defendant in Error.*	No. 171.
THE WINONA & SAINT PETER RAILROAD COMPANY, *Plaintiff in Error,* *vs.* THE TOWN OF ELGIN, *Defendant in Error.*	No. 172.

PETITION FOR RE-HEARING.

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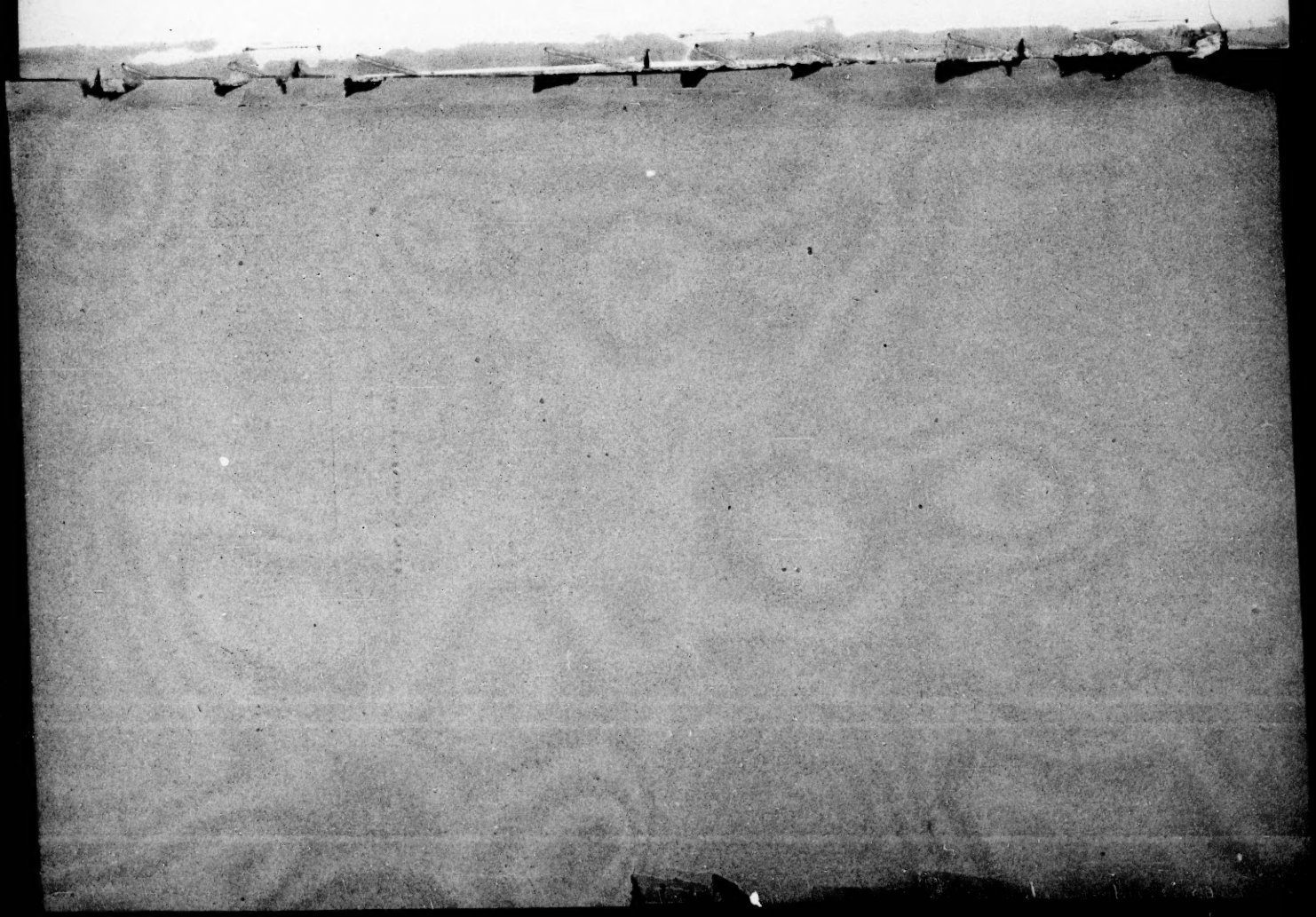

Supreme Court of the United States.

OCTOBER TERM, 1891.

	THE WINONA & SAINT PETER RAILROAD COMPANY, *Plaintiff in Error,*	In error to the Supreme Court of the State of Minnesota.
171.	*vs.*	
	THE TOWN OF PLAINVIEW.	
	THE WINONA & SAINT PETER RAILROAD COMPANY, *Plaintiff in Error,*	
172.	*vs.*	
	THE TOWN OF ELGIN.	

PETITION FOR RE-HEARING.

Now comes the plaintiff in error by its counsel and respectfully petitions for a re-hearing of the decision of this honorable court, rendered in each and both of the

above entitled causes on the 29th day of February last, wherein it is held and decided that no federal question is presented.

THOMAS WILSON,
LLOYD W. BOWERS,
Attorneys for Plaintiff in Error.

STATEMENT OF GROUNDS ON WHICH REHEARING IS PRAYED.

This Court in the decision of these cases said:

"The State Court gave to the decisions of the Circuit Court of the United States all the effect which they could possibly have, namely, the conclusive settlement of the liability of the towns on the bonds to Marshall and Ilsley as bona fide purchasers. The right of action of the towns depended upon sustaining the Marshall and Ilsley judgments as conclusive and not to be reviewed by the State Courts. It was an essential element of the suits of the towns to show that they had been legally compelled to pay the bonds in suits by bona fide holders of them. In pursuance of that claim the State Court held that the judgments of the Circuit Court of the United States were valid and conclusive in favor of the towns in the present suits. There was no question before the Circuit Court of the United States as to the liability of the towns to the Plainview Company upon the bonds. The decisions of the Circuit Court of the United States held that Marshall and Ilsley as bona fide purchasers of the bonds acquired rights which were superior to those of the Plainview Company. The judgments in the present suits are founded on the fact that the wrongful acts of the Plainview Company enabled Marshall and Ilsley to acquire those rights."

On this assumed state of facts, viz, that Marshall and Ilsley had "acquired rights which were superior to those of the Plainview Company," this Court overruled our contention that the State Supreme Court in these suits failed to give full faith and credit to the judgments of the United States Circuit Court.

We concede that if the premises, assumed as the grounds of the decision, are admitted or established, the legal conclusion arrived at follows. That federal question is presented only when the State Court refuses to give to the judgment of a federal court *such* faith and credit as would be due and given, under like circumstances, to a judgment of the highest court of the State.

It is not questioned but that if the Plainview Company having illegally obtained the bonds, which were unenforcable against the towns by it, illegally transferred them to a *bona fide* purchaser against whom the towns could interpose no defense that was a legal wrong and injury on part of the Plainview Company, for which it might legally be compelled to respond in damages to the towns, notwithstanding a prior judgment on the bonds in favor of its transferees on the ground of their superior rights. But we, with great deference, beg leave to submit that the premises assumed are contrary to the facts indubitably established by the record. And as this is a pivotal point in these cases we deem it our duty to call attention particularly and fully to every part of the record that throws light upon it.

(I) It is not claimed in the pleadings in the Marshall and Ilsley cases that these plaintiffs had any rights superior to those of the Plainview Company.

The Court will observe that in the complaint in those cases the plaintiffs did not allege that they had acquired any such rights. On the contrary they stand on the rights acquired by the Plainview Company to which they succeeded. It is alleged that "the defendant (the town of Plainview) *being duly authorized by the laws of the State of Minnesota* * * made, executed and delivered (to the railroad company) its

bonds" and "that the plaintiffs are now the lawful owners and bearers of said bonds." And a copy of one of the bonds containing the recitals showing the very section of the Statute under which they were issued is annexed to the complaint.

Transcript of Record in Plainview Case, 24-25.

The defendant answered setting up among other things the several steps taken and acts done, preliminary to the issue of the bonds, as required by the statute, on and in pursuance of a petition of the resident tax-payers of the towns; and farther that (in the Plainview case) after all those proceedings and before the issue or delivery of any of the bonds, an action was begun by Harrington to have the officers of the town enjoined from issuing and the railroad company from receiving them on the ground that section 7, of the enabling act was unconstitutional and void, and the proceedings under it, therefore, invalid; and that in said action it was by the Supreme Court of the State determined and adjudged that that section of the act was unconstitutional and void, and all the proceedings under it invalid. It was also alleged in the answer that that section of the act had been repealed and that all the bonds contained a recital showing on their face that they were issued under section 7.

Transcript in Plainview Case, page 27-30.

The plaintiffs replied among other things that they purchased the bonds and coupons for a valuable consideration without notice in fact of any of the matters relied on in defence of said action, "*except such as appear on the face of said bonds from the recitals therein contained, copies whereof in substance are annexed to said complaint.*" It will be noticed that they never denied, but on the contrary, frequently, at least impliedly,

admitted that they had ample notice and actual knowledge of all the facts recited in the bonds, *i. e.* that they were issued under section 7 of the act, in pursuance of a petition of the resident tax-payers. Plaintiffs farther replied that about three months after the purchase of the bonds they obtained information as to the Harrington suit, (but deny that they were in any way parties thereto,) and that on March 15th, 1879, judgment was entered in that suit dissolving the injunction and dismissing the action, and that on the 18th day of March, 1879, the supervisors of the town issued the bonds, and that said bonds were regularly issued to the Plainview Railroad Company, under and in pursuance of said chapter 106 of the General Laws 1877, and the proceedings under the same "*as said town had full power and lawful authority to do pursuant to the laws of the State of Minnesota and the decision of the Supreme Court previously made in respect to the provision of said statute.*"

(II) The following facts were stipulated and admitted, viz :

"That the plaintiffs purchased the bonds and coupons in question July 9th, 1879, for value without notice in fact of any matter relied on in defence, except such as appear upon the face of said bonds" and that "the only matters relied on in defence are ; First, That the provisions of chapter 106, and particularly of section 7 of chapter 106 of the General Laws of the year 1877 of the State of Minnesota under which the bonds and coupons in question were issued, were and are unconstitutional and void. Second, That the decision of the Supreme Court of the State of Minnesota in the case of Harrington vs. the Plainview Railroad Company, et al., is conclusive and binding in respect to said first point upon the United States courts as an exposition and construction of the constitution of the State of Minnesota."

Transcript of Record in Plainview case, page 33, 34.

The record in those cases shows (and all this is uncontradicted and admitted), that it was admitted in Harrington's case as follows:

"That relying on and induced and influenced by the proceedings set out, and particularly by the resolution of the board of supervisors, the Plainview Railroad Company constructed and had before the commencement of that action * * * in all respects complied with the terms and conditions specified in the proposition by it to be performed."

Transcript of Plainview Record, page 36.

And it is expressly admitted in these cases (Transcript of Plainview Record, page 146)

"That the terms and provisions of the statute under which said bonds were issued were in all respects performed and complied with by said Plainview Railroad Company and that the propositi n submitted under said statute was in all respects complied with and that the said Plainview Railroad Company had prior to the issuance of said bonds earned and become entitled to same if the law authorizing their issue was constitutional."

It will thus be seen that as a question of pleading and of fact it is, and in the cases of Marshall and Ilsley was, conceded, that all conditions precedent had been complied with before the bonds were issued to the Plainview Railroad Company and before the Harrington suit was begun so that (a) that company was legally entitled to them when it received them *if the law authorizing their issue was when they were issued a legal warrant therefor.* (b) That Marshall and Ilsley had legal notice of the law under which they were issued when they purchased them and therefore by no legal possibility could have any rights against the town superior to the Plainview Railroad Company, and, that the ground on which Marshall and Ilsley claimed the right to recover was that the law authorizing the issue of the bonds

was a valid authority therefor and that the bonds were therefore legally issued and valid.

(III) So much for the pleadings and the admitted facts, in the light of which we now ask the attention of this Court to the decision of the United States Circuit Court in those cases. (3 McCrary 35. Transcript of Record in Plainview case, page 35.)

The Court after reciting many of the above stated facts, says:

"The only matters relied on in defense are: First, That the provisions of chapter 106 of the laws of Minnesota of 1877 and particularly of section 7 under which the bonds and coupons issued were unconstitutional and void. Second, That the decision of the Supreme Court of Minnesota in Harrington's case is conclusive and binding in respect to the first point upon the federal courts as an exposition and construction of the constitution of the State of Minnesota."

The view taken by the Court will render it necessary to consider only the second defense.

(First. The recitals in the bonds are conclusive evidence in favor of the plaintiffs who purchased without other information than that which appears upon their face that all the conditions precedent prescribed in the law had been complied with.)

Second. *If the law under which the bonds issued had been sustained and recognized as valid by the highest court of the State at the time, no subsequent act of the judiciary can impair their validity in the hands of the plaintiffs.*

(The bonds on their face refer to the law under which power to issue them was given by the legislature and the coupons though detached are described with sufficient certainty in the complaint, and the evidence is plain that they belonged to the bonds issued.) If the bonds are valid obligations the coupons are identified and follow the bonds, *so that if the second proposition can be applied the plaintiffs are entitled to recover.*

The Court goes on then to show that the law under which the bonds were issued had been sustained and

was recognized as valid at the time the bonds were issued, and after citing the authorities to show this added:

Here was a recognition, in my opinion, of the validity of this law and a full and comprehensive construction of the section, (7). * * The Plainview Railroad Company had also entered into an agreement with the town of Plainview, and by the construction of its road was entitled to recover town bonds, when a suit was commenced in the District Court of the State by a taxpayer and citizen of the town, (Harrington), to enjoin and restrain their issue, and a preliminary injunction was issued. This suit was subsequently tried and the action was dismissed by the Court and the injunction dissolved and the town issued its bonds. An appeal to the Supreme Court of the State was taken by Harrington, and among other things *it was argued on the hearing that section 7 of the act was unconstitutional and it was so declared by the Court. It is insisted that this decision of the highest court of the State is binding, and the defendants entitled to judgment. Such is not my opinion.* The federal courts, it is true, generally follow the adjudication of the highest courts of the State in the construction of its statutes, but exceptions are recognized, and these cases fall within the rule laid down in City vs. Lamson, 9 Wall. 477. *which is, briefly, when a decision of the highest tribunal at the time the bonds issue favors the validity of the law under which they issue, a subsequent decision impairing their validity will not be followed to the prejudice of bona fide holders.*" To the same effect is Douglass vs. Pike Co. 101 U. S. 687.

"*We have no hesitation in saying that the rights of the parties are to be determined according to the law as it was judicially construed to be when the bonds in question were put upon the market as commercial paper.*" (The italics above are ours.)

In analyzing this opinion we may eliminate from it the parts above enclosed in parentheses for it is expressly admitted, as has been above shown, that before the bonds were issued *all conditions precedent* had been complied with by the Plainview Railroad Company, *and that it was entitled to them if the town had authority to issue them,* and it is also stipulated and admitted that

the coupons sued on had been cut from the bonds referred to. See Transcript of Record in Plainview case, page 33. Briefly stated, the Court held that before and when the bonds were earned and issued the law was held valid by the State Court, and therefore *that no subsequent decision could render it invalid as to pre-existing contract rights or impair the validity of the bonds —and that on that ground and for that reason the plaintiffs were entitled to recover—that that proposition "must control the decision."* Citing and following The City vs. Lamson 9 Wall, 477, and Douglass vs. Pike Co. 101 U. S. 687, which are merely two of a long line of decisions of this Court settling the law in such cases.

It would be idle to trespass on this Court by a reference to the cases in which the doctrine is settled that if a contract when made was valid according to the laws as they had been previously expounded by the judicial tribunals of the State, and as they were understood at the time, no subsequent act of the legislature or of the judiciary should be regarded as establishing its invalidity; and that in case there was no decision of the State Courts as to the validity and construction of the statute under which bonds were issued, when or before they were issued, the Federal Courts would determine on their independent judgment, what was the law when the legal rights of the parties attached." This, as this Court has settled, "is a law of this Court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal."

This Law the U. S. Circuit Court in Marshall and Ilsley's cases merely applied, as it was in duty required to do. And this doctrine and the decision of that Court would have been just as applicable in favor of the

Plainview Railroad Company in a suit brought by it against the towns on the bonds or coupons as it was in that case. In deciding in favor of the plaintiffs in those suits the Court necessarily affirmed that, as to any person whose rights had attached before the decision of the State Supreme Court in Harrington's case, the law was valid and *therefore* the *bonds* issued in persuance of it, *were valid*, and *therefore on such bonds the town was liable*. We beg leave to insist that it is not possible, from either the pleadings, the admitted facts, the language of the Court, the doctrine applied or the decisions cited and followed, to infer that that Court held that Marshall and Ilsley as *bona fide* holders acquired rights "superior to those of the Plainview Company." This Court must have been inadvertently led to that conclusion by the repeated asseverations of the counsel for the defendants in error to that effect. It is idle for the learned counsel to attempt to base an argument on the use of the words "bona fide holders" in the opinion of the Court in Marshall and Ilsley's case. The context clearly shows that they were not there used in any technical sense, or with a view to limit the decision in any respect or to qualify the express declaration that "The Plainview Railroad Company by the construction of its road was entitled to receive the town bonds" when the Harrington suit was begun.

(IV) These defendants in error removed those suits into this Court by writ of error and the record and the briefs of the counsel for both parties are a part of the records of this Court to which we may properly here refer. See

Given vs. Wright, 117 U. S. 655.

(The cases are No. 804, October Term 1882). By reference to these briefs it is shown that not

only was there no pretense that Marshall and Ilsley had any rights superior to those of Plainview Railroad Company, or any rights to recover except on the ground that the law was a legal warrant for the issue of the bonds and the bonds therefore valid, but it is expressly affirmed that no such pretense or claim was or could be legally made. See Assignments of Error of the counsel for Plaintiffs in Error in his brief at pages 18 and 19. On pages 58 and 59 he says:

"*The Court below manifestly erred in placing its decision solely and exclusively upon the ground that the case of the State vs. Highland had supported the constitutionality of the law before the bonds in this case were issued or the contract made.*"

And on page 65 he says:

"*It is not claimed that plaintiffs are bona fide purchasers as it could not well be, for these bonds recite that they were issued under proceedings had upon petition of a majority of resident tax-payers, which is the proceeding prescribed by section 7 of chapter 106 of the laws of 1877, which the Supreme Court has held void, and every coupon declares that it is for one year's interest on bond—describing it by its number.*"

And the briefs of the counsel *for defendants in error* show not less clearly that it was not claimed, and that the Circuit Court of United States had not decided that Marshall and Ilsley could recover on any other grounds than that the bonds were legally issued and valid.

Judge Pinney, the leading counsel for Marshall and Ilsley, in his brief at page 1, said, "They (the bonds) show on their face that they were issued in accordance with section 7 chapter 106 General Laws, Minnesota, 1877."

And he stated the grounds on which he claimed the plaintiffs should recover in the following words:

"The following propositions are well supported by

repeated adjudications of this Court and of state courts of the highest respectability, and show that the judgment of the Court below is correct and should be affirmed.

FIRST.

First, The decision of the Supreme Court of Minnesota in Harrington vs. Plainview Railroad Company, 26 Minn., 224, that the law under which these bonds were issued is unconstitutional, is not conclusive or binding on the United States Courts and ought not to be followed by this Court as to bonds issued before it was made.

The statute under which these bonds were issued had been acted upon and construed in the most formal and solemn manner and its meaning settled, in State vs. Highland, 25 Minn., 355, notwithstanding it was distinctly objected that section seven of the statute under which the proceedings had been taken in that case, as well as in this, was unconstitutional and void." (Ib page 10.)

"Second. The legislation authorizing the issue of these bonds is constitutional and valid under the constitution of Minnesota." (Ib page 16.)

The Third and Fourth points by him made touch no issue, or throw no light on any question involved in these cases. See his brief, pages 24 and 25. He added:

"Finally, no man, whether lawyer or layman, after having examined the course of legislation and of judicial decisions, ending with State ex rel, etc. vs. Highland, 25 Minn., 355, would have had the least doubt about the validity of these bonds, or have hesitated in the least about purchasing them. They were valid according to these decisions when my clients purchased them bona fide, for value, and before any judicial decision to the contrary, and while there was a judgment of a competent court in full force and effect affirming their validity." (Ib page 25.)

See also brief of Thomas Wilson, one of the counsel for defendant in error to same effect. These briefs of the counsel for both the plaintiffs and defendants in error make it clear that it was not even pretended or claimed that Marshall and Ilsley had any greater or

other rights than the railroad company, or that their right to recover did not depend *solely on the validity of the bonds.*

(V) It cannot be presumed that that Court gave judgment in those suits on the ground that the plaintiffs had acquired rights superior to the Plainview Company, except on the assumption that it and the counsel were ignorant of the plainest elementary principles of law; for it is a well settled legal proposition that no one taking bonds containing such recitals could as against the alleged makers acquire any rights superior to those of the payees.

Township of Oakland vs. Skinner 94 U. S. 255, 258.

McClure vs, Township of Oxford, 94 U. S. 429, 443.

County of Bates vs. Winters, 97 U. S., 83, 87-8, 91.

Angle vs. Ins. Co., 92 U. S. 341-2.

Dixon Co. vs. Field, 111 U. S. 83, 92.

School Dist. vs. Stone, 106 U. S., 183, 187.

It is the a, b, c of the law that "every dealer in municipal bonds which, upon their face refer to the statute under which they were issued, is bound to take notice of the statute and of all its requirements." Nor is there any authority or countenance whatever for the contention that the rule above invoked– that the law is to be construed as it was understood when such bonds were earned and issued is not applicable in favor of the payees of the bonds. Both the reason of the rule and the express adjudication of this Court are to the contrary

See,

Taylor vs. Ypsilanti 105 U. S. 60, 70, 72, and other cases cited in our brief on the merits.

It may not be irrelevant here to call attention to the fact that those were cases in which it was *peculiarly proper* and fit that that rule should be applied.

Until after those bonds were earned the validity of the law had never been questioned, we believe by any Court, state or federal; on the contrary this court and the highest courts of different states, had over and over again recognized the validity of such a law and enforced the payment of bonds issued in pursuance thereof as we showed in our brief on the merits page 30-35. And no court had more emphatically declared such a statute to be valid than the Minnesota Supreme Court up to the decision in Harrington's case which was after the bonds had been earned and issued. See,

Davidson vs. Ramsey Co, 18 Minn. 482.
Guilder vs. Town of Ostego, 20 Minn. 74.
Guilder vs. Town of Drayton, 22 Minn. 366.
State ex rel vs. Town of Highland, 25 Minn. 355.
Marshall and Ilsley vs. town of Elgin, 3 Mc Crary, 35.

After every dollar had been expended by the railroad company and the bonds earned by it a suit was commenced by Harrington *to enjoin their issue.* The trial court held the law valid and dismissed the action. The plaintiff's refusing to give a supersedeas bond, the bonds were issued to the railroad company; but by their recitals they showed on their face the very section of the statute under which they were issued so that any one purchasing them legally stood in the shoes of the payees. From an order denying a new trial in that case the plaintiff appealed. When the case was reached in the Supreme Court it was shown and admitted *that the bonds had been issued,* so that the right to enjoin their

issue was merely an abstract question, in the decision of which no party before the Court had the least interest. But the Supreme Court held that inasmuch as the judgment was for costs—*in the sum of four 75-100 dollars*—it would retain jurisdiction—and in that case involving only $4.75 that Court held against the unbroken line of authorities in this Court and in the several state Courts in which the question had arisen—and we may add in the teeth of the most clear legal principles that that law was unconstitutional. *See Transcript of Record in Plainview case page 63, Exhibit E.*

Harrington vs. Town of Plainview, 27 Minn. 224.

That that decision was right on either principle or authority we believe no lawyer now contends. There is not a word in the constitution of the State of Minnesota affecting the question. Perhaps no case can be pointed to which better illustrates the wisdom, and, unless justice is to be sacrificed, the necessity of the established rule of this Court applied by the Circuit Court in Marshall and Ilsley's case. As this Court has said, it "could not yield to the decision of the State Court under such circumstances without abdicating the performance of one of the most important duties with which this tribunal is charged."

Assuming, therefore, that we are right in the conclusion arrived at, that the judgment of the Court in Marshall and Ilsley's case was in fact and necessarily on the ground that the statute was a legal authority for the issue of the bonds, and that the bonds were therefore valid obligations against the towns—the federal question is sharply presented—did the Supreme Court of the State of Minnesota in this case give due faith

and credit to those judgments? For it is settled by this Court that

"The question whether a State Court has given due effect to the judgment of a Court of the United States, is a question arising under the constitution and laws of the United States, and comes within the jurisdiction of the Federal Courts; * * * that the judgments and the decrees of the Circuit Court of the United States, sitting in a particular State, in the Courts of that State, are to be accorded such effect, and such effect only, as would be accorded in similar circumstances to the judgments and decrees of a State tribunal of equal authority; and that "it is within the jurisdiction of this Court to determine * * * whether such due effect has been given."

Crescent Live Stock Co. vs. Butchers' Union, 120 U. S., 141, 166-7.

And this Court, in the same case, speaking of a judgment of the United States Court, added, "its integrity, its validity and its effect are complete in all respects between all parties in every suit and in every form, when it is legitimately produced as the foundation of an action or of a defense, either by plea or in proof, as it would be in any other circumstances." ib. 157-8. This would necessarily be the rule even if no statute of the United States had been enacted, declaring it. And this rule is violated in both letter and spirit when the Courts of either jurisdiction disregards the judgments of the other or give them any *less or greater or other effect* than they would give to their own under like circumstances. For either a State or Federal Court to hold any man liable in damages because he or any other man had enforced his rights in the other, or because of any alleged error of the other Court, would lead, necessarily, to unseemly conflicts and reprisals in violation of the spirit of the constitution and inconsistent with the existence of our dual system.

Let it be noted that judgment in Marshall and Ilsl
invoked and necessarily so by these defenants in e
of their action in these cases----Whereas if due f
been given to such judgment it was a perfect defen
do not claim that the disregard by the State Court
this Court raises this federal question.

The learned counsel for the defendants in error misapprehend the necessity and spirit and scope of this rule when they affirm that it is limited to cases of mere technical estoppel. So limited it would fall far short of meeting or obviating the evil intended to be remedied. If we are right in our contention that, in deciding Marshall and Ilsley's cases, the Court necessarily affirmed the validity both of the bonds and of the law under which they were issued (at the time they were issued) then we think it is clear that in these cases the Supreme Court of the State of Minnesota did not give to the judgments in those cases such faith and credit as it would have given to its own judgment under similar circumstances; for surely it will not be contended, by any one, that any court would render judgment against a party on the ground that that party or his predecessor or successor in interest had without fraud obtained a judgment (alleged to be erroneous) in the same Court. Such a proposition is too baldly absurd and inconsistent with established legal principles to be contended for. In these cases that the State Supreme Court based its judgment on the ground of the alleged erroneousness of the judgments of the U. S. Circuit Court in Marshall and Ilsley's cases is made apparent by reference to the judgments and opinion of the State court.

This Court will take judicial notice that that court is composed of five judges, the concurrence of three of whom is necessary to a decision or judgment. One dissented in toto; two—the Chief Justice and Justice Dickinson—used language whose meaning cannot be misunderstood. They say, "*We base the responsibility of the Plainview Company distinctly upon the following considerations:*"

"That company having procured the unauthorized

Ilsley's cases was
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execution and delivery to itself of these bonds, * * and having negotiated the same so that they have come into the hands of parties who have enforced a recovery upon them by proper action in a competent tribunal, the corporation is answerable for its own unauthorized acts which have resulted in this injury to the town *unless this consequence—the recovery upon the bonds—is to be deemed too remote to afford a ground of legal liability.* As respects the acts of the Plainview Company *this injurious consequence* is not remote but proximate. *The damage suffered by the town consists in its being compelled to pay these bonds.* * * * *That the judgment by which the liability of the town to pay the bonds has been conclusively established was erroneous does not make remote the damage thus resulting to the town,* if this result—the enforcement of the bonds—was within the purpose of the company when it procured and negotiated them as the obligations of the town. It is argued that the company could not have anticipated an erroneous decision, and should not be held liable for the consequences of such a decision. Probably it did not anticipate or suppose that an adjudication holding the town obligated to pay the bonds would be erroneously made, for it may have supposed the bonds to be valid and rightfully enforceable; but the fact that it did not suppose such an adjudication would be erroneous does not make remote the damage complained of. It is proximate and liability follows because the company procured and negotiated the unauthorized securities as obligations of the town to be enforced as such, *and because they have been so enforced* in a Court having jurisdiction as the corporation anticipated they would be." (The italics are ours.)

There is no attempt to disguise the fact that that Court did not give or intend to give due or full faith and credit to those judgments. And even if the other two judges had placed their decision on different grounds it would be wholly immaterial, for as these two held that the plaintiffs in that suit could only recover on these grounds—Justice Mitchell having held that they could not recover on any ground—if these grounds are untenable and in disregard of the judgment of the U. S. Circuit Court the judgment of the Court is erroneous and raises a federal question. But the opinion of

the other two judges, though more prolix and obscure, hardly less clearly shows that they considered the plaintiffs in those suits entitled to recover on the ground that they had been illegally held by the U. S. Circuit Court. Their language is, "It is sufficient to say that Court differs with this Court upon the question of the validity of the bonds and accordingly adjudges the holders entitled to recover thereon and notwithstanding the recitals therein."

But the federal question is presented whether that Court intentionally or unintentionally disregarded or failed to give due effect to the judgment of the U. S. Circuit Court.

One or two suggestions as to the introduction of what we deem irrelevant matters on the argument of these cases:

The decision in Harrington's case was on the argument in this Court referred to as if it should have some controlling or important influence in the decision of these cases. But in no legal point of view does it cut the least figure in the determination of either. The town of Elgin was not a party to that suit directly or indirectly and in this suit, by it, the decision in that of course could not be an estoppel against this plaintiff in error. And it is also clear that that decision is not an estoppel in this suit of the town of Plainview. The Supreme Court of Minnesota in Harrington's case ordered a new trial below; but no new trial was had and no judgment was entered. See record of that suit in both the District and Supreme Courts of Minnesota. Plainview Record in these suits pages 64-93, Ib. 115, 118. See also testimony of Charles J. Stauff, Clerk of the State District Court Ib. page 53. The bonds were transferred before that case was argued in the State

Supreme Court and this plaintiff in error never succeeded to or claimed any interest in any of them. If these suits are to be sustained against the plaintiff in error it must be through evidence competent against it. Neither the U. S. Circuit Court in Marshall and Ilsley's case nor the State Court in these cases considered that there was an estoppel. And even if there had been a new trial and judgment against the defendants in that suit its only legal effect, as we have above shown, would have been to make the Plainview Railway Company, together with the town of Plainview and its officers, liable for the costs. When the statute of 1881 was enacted, and when it was accepted and acted upon by this plaintiff in error, no court had held or intimated, nor could it without disregard of established legal principles be held, that the Plainview Company, or its successors in interest, was, or by any legal possibility could be liable for the obtaining or transfer of those bonds to one having such notice as they carried on their face. With just as much reason or force might it be held that a grantee in a tax deed or guardians deed, afterward held invalid, or that the grantor in any quit claim deed, could be held legally liable at the suit of one claiming a prior and paramount right to the premises conveyed for honestly giving a quit claim deed thereof to one having notice of all the antecedent facts affecting the title. No Court, we think, has ever gone to any such a romantic length. The Supreme Court of Minnesota, in none of the cases referred to, has intimated any such doctrine — *but the contrary.* It held, or clearly intimated in Harrington's case and in these cases that such a transfer with such notice could not legally affect any one. And this Court has frequently announced the same doctrine as an undoubted elementary rule of law. The Su-

preme Court of Minnesota in these cases holds the plaintiff in error liable because the bonds were obtained and transferred *and because they have been illegally enforced.* The recovery on the bonds by Marshall and Ilsley is as the opinion clearly shows the "ground of legal liability." They held that—to use the language of two of the judges—"The damage suffered by the town consists in its being compelled to pay these bonds" and that the fact "That the judgment by which the liability of the town to pay the bonds has been conclusively established was erroneous does not make remote the damages thus resulting to the town." The judgment of the State Courts in these suits is the first and only judgment that affected the rights of this plaintiff in error, or (except as to the item of costs) the rights of the Plainview Railroad Company; or that directly or indirectly adjudged that either was liable for the alleged torts for which judgment is rendered in these suits. Their rights and their liability therefore must in these suits be dealt with as if the Harrington suit had never been begun or tried. We make these suggestions merely to draw attention from what we deem irrelevant matters to this single federal question. *Did the State Supreme Court in these suits give due faith and credit to the judgment of the United States Circuit Court in Marshall and Ilsley's case?*

THOMAS WILSON,
LLOYD W. BOWERS,
Attorneys for Plaintiff in Error.

The undersigned counsel for the plaintiff in error in each of the above entitled suits, do hereby respectfully certify that, after a careful consideration of the questions of fact and law involved and of the grounds on which this petition is made, they believe these to be proper cases to be reheard touching the matters and questions stated in the above petition; and that the grounds assigned for such rehearing are meritorious and well founded in law.

THOMAS WILSON,
LLOYD W. BOWERS,
Atty's for Plaintiff in Error.